

## **Exhibit 1**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Section 304  
. Case No. 04-14268 (RDD)  
PARMALAT FINANZIARIA, S.P.A., . (Jointly Administered)  
et al, .  
Debtors in a Foreign Proceeding . New York, New York  
. Thursday June 21, 2007  
. 2:04 p.m.

TRANSCRIPT OF HEARING TO CONSIDER ENTRY OF  
A PERMANENT INJUNCTION  
BEFORE THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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1 (Proceedings commence at 2:05 p.m.)

2 THE COURT: All right. Parmalat Finanziaria.

3 MS. GOLDSTEIN: Marcia Goldstein, Weil, Gotshal &  
4 Manges, on behalf of Parmalat S.p.A. and the foreign debtors.  
5 With me today are my partner Howard Comet, also, Scott Cohen,  
6 and I would like to introduce to Your Honor Mr. Nicola  
7 Palmieri, who is the general counsel of Parmalat S.p.A.

8 Your Honor, it has taken us quite a while to get  
9 here; three-and-a-half years after the collapse of Parmalat  
10 in one of the biggest financial scandals ever, and almost a  
11 year since we filed this specific motion for a permanent  
12 injunction.

13 The entry of the permanent injunction in the 304  
14 case would bring to a conclusion a very critical component in  
15 the largest Italian restructuring to occur to date. The  
16 permanent injunction will support Parmalat's global  
17 reorganization and ensure the orderly determination of claims  
18 and the administration of assets in a centralized forum.

19 Your Honor, we have submitted, I think, numerous  
20 pleadings that support the proposition that this Italian  
21 proceeding satisfies the requirements of Section 304 of the  
22 Bankruptcy Code, specifically Section 304(c). It's warranted  
23 under all of the facts and circumstances of this case, and  
24 the factual predicates for the requested relief are set forth  
25 in the lengthy record before this Court in great detail. And

1 I would, subject to Your Honor's views, dispense with going  
2 through and reciting the procedural history before this  
3 Court, as well as the procedural history of this case in  
4 Italy.

5 We believe that satisfaction of all of the factors  
6 under 304(c) have been established in our briefs, but I think  
7 at this juncture, I would just summarize that and proceed to  
8 deal with the objections.

9 THE COURT: All right. I generally agree with you  
10 about not having to go through the procedural history, but I  
11 think it would be helpful for the record just to summarize  
12 the notice that was given here, particularly since we had an  
13 original hearing on a preliminary injunction and then a  
14 fairly long hiatus between that hearing and this hearing.

15 MS. GOLDSTEIN: Your Honor, in terms of that  
16 history, the preliminary injunction was extended numerous  
17 times. We had a variety of status conferences. At the  
18 conclusion of each conference, this Court extended the  
19 preliminary injunction notice to all of the parties and set  
20 additional hearings.

21 We also had a hearing set for May 2nd, which was  
22 noticed in accordance with the order of this Court. That was  
23 adjourned at the request of both Parmalat and Bank of America  
24 to today. Notice was given of today's hearing to all of the  
25 parties on the service list, and this hearing was simply

1 postponed from the original ten o'clock time to two o'clock  
2 by order of this Court, and that notice was also served on  
3 all parties, and the objectors that we were aware of were  
4 called as well with respect to the two o'clock hearing today.

5 THE COURT: And the original hearing on the  
6 permanent injunction, notice was given to all --

7 MS. GOLDSTEIN: All creditors.

8 THE COURT: -- all known creditors and by  
9 publication, as well as actual notice?

10 MS. GOLDSTEIN: Yes, Your Honor.

11 THE COURT: Okay. Thank you.

12 MS. GOLDSTEIN: Your Honor, just moving forward with  
13 a bit of a summary as to the satisfaction of the 304(c)  
14 factors, the first and most important consideration is  
15 comity. And in considering the 304(c) factors, many Courts,  
16 including the Second Circuit in the Treco case, have observed  
17 that comity is the ultimate consideration in determining  
18 whether to provide relief under Section 304.

19 And every case that has reviewed and considered an  
20 Italian bankruptcy proceeding, at least the ones that we  
21 could find, the Rosacometta case, the Artimm case, which were  
22 two bankruptcy cases, and also the Farinacci decision in the  
23 Fourth Circuit all agreed that the Italian bankruptcy  
24 insolvent -- the Italian bankruptcy law and the Italian  
25 insolvency system were worthy of comity. In fact, the Fourth

1 Circuit noted that it would extend comity to the Italian  
2 bankruptcy proceeding basically because it comported with  
3 fundamental United States concepts of justice. That case was  
4 not a 304 case, but a case in which the Court deferred to the  
5 jurisdiction of the Italian Bankruptcy Courts and extended  
6 comity.

7 Overall, in terms of all of the cases considering  
8 Section 304, the U.S. Courts have consistently recognized the  
9 policy of favoring the interests of a foreign country in  
10 winding up the affairs of its own business entities. And as  
11 stated in the Bird case, decided in this district, a Section  
12 304 case ancillary to a foreign proceeding that was in the  
13 United Kingdom, it is the foreign tribunal that is in the  
14 best position to assess where and when and how claims should  
15 be liquidated so as to conserve resources and also maximize  
16 the assets available to the estate for distribution.

17 Parmalat's Italian proceeding certainly fits within  
18 these criteria, is worthy of comity, and also satisfies the  
19 other elements of Section 304(c). 304(c)(1) speaks in terms  
20 of the just treatment of creditors. And in analyzing whether  
21 a foreign proceeding affords just treatment under the  
22 standard of 304(c)(1), Courts consider whether the proceeding  
23 provides a comprehensive procedure leading to the uniform  
24 administration of creditors' claims consistent with the  
25 Bankruptcy Code.

1           The Parma Court has administered all aspects of this  
2 proceeding in Italy: The adjudication of claims objections,  
3 the development of procedures for voting on the composition,  
4 the tabulation of votes in connection with the composition,  
5 and, ultimately, the review and approval of the composition.

6           In this context, no one has asserted that the Parma  
7 Court hasn't provided a fair forum for the adjudication of  
8 claims, or other matters that have come before it, or that  
9 the insolvency laws or the distribution provisions of those  
10 laws are not in accordance with U.S. law or similar to U.S.  
11 law.

12           Notably, in terms of the fairness of the Parma  
13 Court, that Court has both sustained and rejected the claims  
14 objections asserted by Dr. Bondi, including the admission of  
15 certain Bank of America claims over the objection of Dr.  
16 Bondi.

17           So that takes us to 304(c)(2), which relates to  
18 whether the foreign proceeding causes prejudice or  
19 inconvenience to U.S. creditors. In considering whether a  
20 foreign proceeding causes prejudice or inconvenience to U.S.  
21 creditors within the meaning of Section 304(c)(2), Courts  
22 analyze primarily whether the foreign proceeding affords  
23 sufficient procedural safeguards to U.S. creditors, and  
24 whether U.S. creditors are suffering any particularized harm  
25 due to the requirement that they have to file and proceed



1 with their claims in the foreign proceeding.

2 With respect to these requirements, again, the  
3 Italian proceeding has satisfied them. There has been  
4 sufficient notice of all material events in that proceeding  
5 to creditors of the foreign debtors, including U.S.  
6 creditors. No creditor has complained of a lack of due  
7 process, of a lack of notice, or a lack of other procedural  
8 safeguards. In fact, there is no basis to conclude that U.S.  
9 creditors have suffered any particular prejudice or  
10 inconvenience under the standard of Section 304(c)(2). The  
11 fact that they have to file their claims and pursue their  
12 claims in Italy is not a basis on which to assert they have  
13 been prejudiced in any way.

14 In fact, both Bank of America and ABN AMRO, who are  
15 -- Bank of America being the primary objector today, and ABN  
16 AMRO also objecting today, they filed their claims and are  
17 pursuing their claims in the Italian Court.

18 No party has asserted that the Parma Court is  
19 treating U.S. creditor claims differently than non-U.S.  
20 creditors. In this instance, the objecting banks, and I'll  
21 just refer to them in that way at this point in time, are  
22 sophisticated institutions, they knowingly invested or  
23 extended credit to an Italian-based enterprise, and, Your  
24 Honor, with that comes the understanding that if you have to  
25 enforce your claim in an Italian bankruptcy case, that you

1 would be having to go to the Italian Court. And so it could  
2 not be viewed as prejudicial simply to have to litigate your  
3 claim in that court.

4 Now Bank of America talks a lot in its papers about  
5 Sections 304(c) (1) and (2). It does not complain that U.S.  
6 creditors generally are being treated improperly or different  
7 from non-U.S. creditors. Rather, it talks about itself being  
8 allegedly singled out by Dr. Bondi. Why? Because Dr. Bondi  
9 has chosen to object to Bank of America's claims, in addition  
10 to pursuing a multi-billion-dollar recovery action against  
11 Bank of America. The objections and the recovery action all  
12 relate to the same set of transactions.

13 The fact is, Your Honor -- and I'll get back to the  
14 Bank of America objection and back to the ABN objection --  
15 the fact is that the Italian insolvency law shares many  
16 fundamental similarities with corresponding provisions of  
17 United States insolvency law, including provisions that are  
18 designed to prevent fraudulent or preferential disposition of  
19 property.

20 And, frankly, the distribution of proceeds under the  
21 composition and the distribution scheme of Italian bankruptcy  
22 law is substantially in accordance with the priorities  
23 prescribed by Title 11, and all are in compliance with  
24 Sections 304(c) (3) and (c) (4).

25 As I will discuss in greater detail later, Your

1 Honor, the Italian law, which the objectors talk so much  
2 about in their pleadings and of which they complain, Article  
3 2704 of the Italian Civil Code, which is known as "*data*  
4 *certa*," is not a provision of Italian bankruptcy law. It is  
5 a provision of the Italian Civil Code. It applies both in  
6 and out of bankruptcy, a fact which is acknowledged by Bank  
7 of America in its own submissions. In fact, they've argued  
8 in Italy that it doesn't even apply in a bankruptcy case.  
9 And it can be easily complied with to ensure the  
10 enforceability of claims against third parties.

11 So in that light, the conclusion is inescapable that  
12 the Italian proceedings are worthy of 304 relief. We are not  
13 aware of any case in which 304 relief has been denied based  
14 upon a provision of a foreign jurisdiction's non-bankruptcy  
15 law, such as *data certa*, which was known to the parties, and  
16 which was simple to comply with.

17 This is not a case, like Papeleras on which Bank of  
18 America relies, in which 304 relief was denied because of a  
19 lack of procedural fairness and procedural safeguards, or  
20 like Treco, where the bankruptcy priority scheme was found to  
21 be repugnant to U.S. bankruptcy law.

22 This is a case different from those. It involves  
23 Italian bankruptcy laws in which the notice procedures and  
24 the fundamental fairness cannot be complained of.

25 During the course of these bankruptcy -- of the

1 Italian bankruptcy proceedings, this Court has provided a  
2 forum for a variety of creditors to express concerns and  
3 raise issues relating to the Italian proceedings. During  
4 this period, the foreign debtors have resolved almost all of  
5 those matters and continue to both litigate and resolve  
6 creditors' claims in Italy. The claims process in Italy  
7 continues to move forward. The Court continues to render  
8 decisions both for and against Dr. Bondi with respect to  
9 those claims objections.

10 And so, at this juncture, we really have only two  
11 creditors, Bank of America and ABN AMRO, who have objected to  
12 the entry of the relief requested. We will also address,  
13 Your Honor, at the conclusion, the issues raised by the PBGC.  
14 It's not really an objection to the permanent injunction.

15 We would view Bank of America as the primary  
16 objector today. As I mentioned, it is also a defendant in a  
17 multi-billion-dollar recovery action commenced by Dr. Bondi,  
18 and which is pending before Judge Kaplan in the District  
19 Court. In that action, Dr. Bondi asserts that Bank of  
20 America's alleged criminal conduct contributed to the fraud  
21 that caused the Parmalat collapse.

22 In many respects, Your Honor, we have to step back  
23 and assess what Bank of America is trying to accomplish in  
24 its attack or -- on the permanent injunction. It is our view  
25 that it is largely motivated by its larger fight with the

1 foreign debtors in the District Court, and also in the civil  
2 and criminal courts in Italy.

3 Your Honor, putting that aside for a moment, a  
4 number of the points made by Bank of America were also made  
5 on behalf of its affiliate BankBoston, and were made by ABN  
6 AMRO, subsets of these points. And so I would like to turn  
7 to the specifics of the Bank of America objection, but I  
8 don't want to lose sight of the fact that we believe that in  
9 light of Judge Kaplan's withdrawal order, that the claims of  
10 Bank of America, particularly the Bank of America, N.A., and  
11 the Bank of America securities claims are the subject of the  
12 partial withdrawal before Judge Kaplan. We do not believe  
13 objections relating to those claims are properly before this  
14 Court. And we will get to that. But we thought, given that  
15 there is some overlap, we'd address the merits of the  
16 objections first.

17 I mentioned the *data certa* principle. We do not  
18 believe that there is any merit to the argument that the  
19 assertion of that principle or the existence of that  
20 principle should in any way make this particular bankruptcy  
21 case unworthy of Section 304 relief.

22 Again, I have already said that we can't find any  
23 304 case where a Court determines that injunctive relief is  
24 inappropriate because a non-bankruptcy law provision is  
25 repugnant to U.S. bankruptcy law, and this provision isn't

1 repugnant to U.S. law generally, I should say. And, you  
2 know, *data certa* is a provision of Italian law that is  
3 applicable to a number of commercial transactions, both in  
4 and outside of bankruptcy; and, yet, Bank of America premises  
5 its argument on repugnancy of the Italian bankruptcy law on  
6 the applicability of the *data certa* provision.

7 Just as an aside, Your Honor, in the litigation in  
8 Italy with respect to the Bank of America/BankBoston claims,  
9 the issue as to the applicability of *data certa* in a  
10 bankruptcy case at all has been raised by Bank of America.  
11 The fact that it is harsh has been raised by Bank of America.  
12 And even the fact that it might be unconstitutional under  
13 Italian law, which, obviously, we don't necessarily agree  
14 with these things, these are points being raised by Bank of  
15 America in the Italian Courts. So they are litigating the  
16 entire issue of the applicability of *data certa* in the  
17 Italian Court, chose to do so, and it just seems incongruent  
18 to come here and say that they need relief here because this  
19 is repugnant to U.S. bankruptcy law.

20 But just to remind the Court, the Italian Civil Code  
21 provision we're talking about, Article 2704, provides as  
22 follows. And this is a translation:

23 "The date of a private writing in which the  
24 signature has not been authenticated, is not  
25 certain, and cannot be asserted against third

1 parties, except from the day on which the writing  
2 was registered, or from the date of death or  
3 supervening physical incapacity to sign of the  
4 person or persons who signed it, or from the date on  
5 which other circumstances occur which establish with  
6 equal certainty that the writing was drawn up  
7 previously. The date of a private writing  
8 containing unilateral declarations which are not  
9 directed to any specific person can be ascertained  
10 through any kind of evidence."

11 The objectors who raise this point are all  
12 sophisticated parties that either expressly knew or should  
13 have known about *data certa*. This is a matter of Italian  
14 commercial transaction law. Indeed, Bank of America's own  
15 filings indicate their awareness of the requirement.

16 And the statute provides very simple means for  
17 satisfaction which these parties knowingly decided not to  
18 comply with. Notwithstanding that, they still have an  
19 opportunity in the Parma Court to argue, through evidentiary  
20 submissions, that *data certa* has been satisfied. And  
21 Parmalat, as a litigation adversary, has the opportunity, and  
22 has argued to the contrary. That's a normal litigation  
23 process.

24 The objecting parties conducted business with a  
25 foreign entity. They need to comply with local law in order

1 to enforce their agreements. This is not a foreign concept  
2 in the United States.

3 I'll give you an example. If these banks entered  
4 into a loan agreement in the United States that says it is  
5 governed by New York law, and ABN raises this issue, but  
6 where the collateral happens to be real estate in the state  
7 of Louisiana, the lenders had better go and get local counsel  
8 and figure out the proper way to record the mortgage in the  
9 local parish. If they don't do that, the lien will not be  
10 enforceable against a third party. Well, that's what *data*  
11 *certa* is about, enforcing a contract against a third party.

12 So the fact that the Italian law results in the  
13 inability to assert the claim against a third part is really  
14 no less arbitrary than the case in which the U.S. lender  
15 whose security interest is voided for a failure to perfect  
16 locally ends up as an unsecured creditor, and as Your Honor  
17 knows in many cases, that can be a worthless claim compared  
18 to the claim it would have had as a secured creditor.

19 So Bank of America has made an effort to refute the  
20 various examples that we've provided in our papers of  
21 procedural requirements in the United States. You know, that  
22 effort, frankly, misses our point, our point being that these  
23 procedural rules are not alien to U.S. law. No one has to  
24 prove that there is an exact provision in U.S. law. I mean,  
25 frankly, 304 talks about comporting with bankruptcy law. And



1 so that removes this even further.

2 But, you know, a party who misses a filing deadline  
3 in a lawsuit, or who allows a statute of limitation to lapse  
4 before bringing a claim is going to be deprived of equitable  
5 recourse, just as a creditor whose claim is barred by *data*  
6 *certa* requirements, or barred by a bar date.

7 State law governing wills is incredibly stringent.  
8 Failure to follow those technical rules can render a will  
9 invalid.

10 And, finally, Your Honor -- not finally, violation  
11 of New York's usury law, even if unwitting, will void a loan  
12 in its entirety, and that's been the law the New York Court  
13 of Appeals -- I don't think this one was cited in our brief,  
14 so I'll give it to you, which is Szerdahelyi, S-z-e-r-d-a-h-  
15 e-l-y-I, v. Harris, 67 N.Y. 2d 42. I mean, these are all  
16 examples of situations where failure to comply has a serious  
17 consequence.

18 And let me just give one more example because it  
19 relates to banking, and so the Bank of America will certainly  
20 be familiar with this. When a bank refuses to pay an attempt  
21 to draw on a letter of credit, U.S. Courts for decades have  
22 consistently applied the rule of law that specifically  
23 upholds the bank's right to insist on strict compliance with  
24 the letter of credit, no matter how trivial. And U.S.  
25 Courts, as a matter of law, for decades, have consistently

1 rejected the arguments made that substantial compliance will  
2 be sufficient.

3           So, you know, if Bank of America wants to quibble  
4 with the ins and outs of these rules requiring compliance in  
5 order to enforce claims, that's fine. But it doesn't change  
6 the fact that even in the U.S., a failure to comply with that  
7 kind of rule will leave a party out in the cold, or,  
8 certainly, make it difficult to enforce rights.

9           Now Article 2704, in contrast to the some of the  
10 U.S. laws I've just mentioned, or views of U.S. Courts I've  
11 just mentioned, is not as stringent. It provides the Parma  
12 Court with the flexibility to consider evidence of the pre-  
13 bankruptcy execution of a written agreement. This is what's  
14 being argued by Bank of America/BankBoston in Italy. You  
15 know, the fact is that Dr. Bondi may argue that the evidence  
16 that they wish to put in is not appropriate, but they're in  
17 litigation and he's asserting his position.

18           But no matter what each side argues, at the end of  
19 the day, Your Honor, the facts, the evidence, and legal  
20 arguments of each of those parties will be evaluated by the  
21 Parma Court fairly and in due course, and no one has asserted  
22 that the Parma Court will not act fairly.

23           None of the objectors have really denied that  
24 they've been, or have asserted that they've been denied an  
25 opportunity to litigate these issues in the Parma Court in an

1 effort to prove their claims over Parmalat's objection.

2 So what's Bank of America complaining about?

3 They're complaining about Dr. Bondi's conduct in pursuing  
4 these objections. Well, but in raising objections to claims,  
5 Your Honor, Dr. Bondi is fulfilling an obligation. He is  
6 ensuring that creditors submit proper documentary evidence  
7 required under the *data certa* requirement so that the Parma  
8 Court can take the opportunity evaluate the proofs of claim  
9 and make rulings.

10 You know, that the foreign debtors, and I've said  
11 this before, as litigation adversaries, particularly Bank of  
12 America, have vigorously prosecuted claims objections, you  
13 know, doesn't mean that the underlying law is improper, it  
14 doesn't mean the conduct is improper, and doesn't mean that  
15 there will not be a fair hearing before the Parma Court.

16 As I mentioned earlier, a number of claims have been  
17 admitted over Dr. Bondi's objection, and so the Court cannot  
18 be accused of being unfair.

19 One other point I'd like to make on this. Again, I  
20 think even some of Bank of America, N.A.'s claims, I think I  
21 already mentioned this, have been admitted over Dr. Bondi's  
22 *data certa* objections, sort of underscores that there is no  
23 lack of fairness in the Parma Court. Dr. Bondi may say that  
24 was unfair, but, certainly, Bank of America couldn't.

25 And it's also a bit misleading for Bank of America

1 to infer that the Parmalat Pacific objection to the Cur  
2 Holdings claim -- and now I'm getting a little more specific  
3 on the facts here -- is simply based on *data certa*. Your  
4 Honor, the pleadings in that litigation over that claim are  
5 really about the nature of the claim, the fraud that  
6 permeated the collapse, and the fraud that related very  
7 specifically to that claim.

8           So we shouldn't assume that that claim is a, quote,  
9 "*data certa* issue." It comes up because there was an  
10 assignment of that claim by Cur Holdings, which was partially  
11 owned by an employee of Bank of America, assigned to Bank of  
12 America, and there is a *data certa* issue regarding the  
13 assignment. But that is not the only element to that  
14 objection.

15           And the same can be said about the Bank of America  
16 securities claim, or, again, it's really a Bank of America,  
17 N.A. claim with the underlying claim against the Brazilian  
18 entity; much more to it than a *data certa* objection.

19           All right. So coming back to Dr. Bondi, he's filed  
20 objections to these claims. There have been allegations of  
21 bad faith because he filed objections to these claims. But  
22 that doesn't constitute bad faith, Your Honor. He has an  
23 obligation to assert the objections that he believes are  
24 consistent with maximizing the value of the estate. And  
25 raising a *data certa* objection is really no different from

1 raising claims objections of all kinds, including perfection,  
2 statute of frauds, anything that a bankruptcy trustee or  
3 debtor-in-possession would look to to object to a claim in a  
4 U.S. Chapter 11 case.

5 Finally, Your Honor, even if there is any kind of  
6 proper allegation of bad faith, and we obviously disagree  
7 with that, where should that be litigated? It doesn't mean  
8 that we don't have a permanent injunction. If something is  
9 going wrong in Italy, if there is a claim that is being made  
10 improperly for any reason, that is something that the Italian  
11 Court should be deciding, not this Court.

12 I'd like to turn to standing as we conclude this  
13 discussion of *data certa*. As I mentioned, the *data certa*  
14 arguments have also been raised by ABN AMRO and raised on  
15 behalf of BankBoston. But we believe that the specific  
16 objections relating to the Bank of America, N.A. claim and  
17 the Bank of America securities claims should not be heard in  
18 this court, in light of Judge Kaplan's withdrawal order and  
19 his related rulings.

20 Judge Kaplan authorized Bank of America to assert  
21 counterclaims in the District Court, and that directly  
22 undermines its objections in this Court.

23 THE COURT: But just compulsory counterclaims,  
24 right?

25 MS. GOLDSTEIN: I'm sorry?

1 THE COURT: Just compulsory counterclaims?

2 MS. GOLDSTEIN: Compulsory counterclaims, Your  
3 Honor. But the Bank of America, N.A. and the Bank of America  
4 securities claims arise out of the very same transactions  
5 that are the subject of the litigation in Judge Kaplan's  
6 court. And we quoted in our pleadings the colloquy between  
7 Judge Kaplan and Mr. Krakauer regarding those claims. They  
8 chose to assert those claims in Italy. They could have,  
9 pursuant to Judge Kaplan's order, also asserted them in the  
10 District Court case.

11 So if you enter the permanent injunction, whether  
12 they object to it or not, they still have the opportunity to  
13 assert those counterclaims, those claims in the District  
14 Court case.

15 THE COURT: So you're saying as a practical matter,  
16 the only claims they have would be compulsory counterclaims?

17 MS. GOLDSTEIN: These claims. I don't know what  
18 other claims they have. The claims they're complaining about  
19 here, which are claims under loan documents which Dr. Bondi  
20 has challenged. They arose out of the very same transactions  
21 Bank of America claims and the counterclaims already asserted  
22 before Judge Kaplan that they were fraudulently induced to  
23 make those very claims.

24 Dr. Bondi has claimed that their actions in  
25 connection with those claims were part of the fraud that led

1 to the collapse of Parmalat. That's his recovery action. I  
2 mean, there's a lot more to his recovery action than that,  
3 but as it relates to those claims.

4 And so they've asserted what they call -- you know,  
5 they've asserted tort claims, but there are contract claims  
6 that are for the same amounts relating to the same loans,  
7 Your Honor. So Judge Kaplan recognized that. He was quite  
8 clear on that. And I don't believe Mr. Krakauer disabused  
9 him of that notion.

10 And so --

11 THE COURT: And then they also -- B of A and BASL  
12 also say that they have direct claims against non-debtor, or  
13 non-Italian-debtor foreign subsidiaries that would be  
14 enjoined by this proposed injunction, at least I thought  
15 that's what they were saying

16 MS. GOLDSTEIN: No. No. Direct claims against --  
17 we have never asserted that their claim against the Brazilian  
18 entity is enjoined by this injunction, and we don't believe  
19 that the current form of injunction does that, as an example.  
20 Also, claims against Wishaw we know haven't been enjoined.  
21 Claims against the Cayman entities, I mean, direct claims.  
22 The injunction -- sort of this moves to a different issue,  
23 but insofar as it enjoins --

24 THE COURT: Let's save that for later because I had  
25 some questions about that.

1 MS. GOLDSTEIN: Okay.

2 THE COURT: But they do have -- let me make sure I  
3 understand this point, though. B of A and BASL do have what  
4 could be termed as independent claims against foreign subs?

5 MS. GOLDSTEIN: Yes.

6 THE COURT: Okay.

7 MS. GOLDSTEIN: And the claims that really they are  
8 complaining about here are the guarantee claims. Those are  
9 the claims that Dr. Bondi has objected to in the Italian  
10 case.

11 THE COURT: Okay. And then I guess, similarly --  
12 well, maybe it's not similar, but I assume it's similar.  
13 Another aspect of B of A's objection is that their reading of  
14 the proposed injunction is that it prevents them from going  
15 against property outside of the United States in respect of  
16 their claims. And I guess --

17 MS. GOLDSTEIN: In respect of their claims against  
18 the foreign debtors, not against the Brazilian entity, not  
19 against Wishaw, as two examples.

20 THE COURT: Okay. All right.

21 MS. GOLDSTEIN: Anyway, Your Honor, getting back to  
22 the standing issue, just to summarize what I think I have  
23 already said, the claims that are being complained of here,  
24 which are the claims being asserted in Italy, which are the  
25 guarantee claims that relate to the claims against other



1 entities, which no one in this proceeding has ever sought to  
2 interfere with, those are the claims that arise, as do the  
3 underlying claims, from the same set of transactions that are  
4 before Judge Kaplan, and as to which he has said  
5 counterclaims can be brought, and certain counterclaims,  
6 compulsory counterclaims, have already been asserted.

7 Now Bank of America has asserted in its surreply  
8 that Judge Kaplan ruled at his October 26th, 2006 conference  
9 that Parmalat's entitlement to a permanent injunction under  
10 Section 304 must be decided by the Bankruptcy Court. And,  
11 obviously, Your Honor, you're here. You must decide the  
12 permanent injunction. But that doesn't completely and  
13 properly characterize Judge Kaplan's ruling with respect to  
14 Bank of America.

15 Judge Kaplan said that any new injunctive relief,  
16 and that would be this permanent injunction, under 304 should  
17 first be addressed by this Court with respect to the 304  
18 relief. But Judge Kaplan has been consistent that anything  
19 relating to the Bank of America claims and that District  
20 Court action, anything that he has withdrawn, has to be  
21 determined by him. And so those claims are not part of this  
22 request for a permanent injunction.

23 Now just to be clear, that is not the case with  
24 respect to the BankBoston claims. They are not subject to  
25 Judge Kaplan's withdrawal. And the fact that these claims

1 have not been admitted, the arguments made with respect to  
2 *data certa*, they're pretty much the same as the Bank of  
3 America arguments, and we believe we've already argued that  
4 the application of *data certa* to the BankBoston claims is not  
5 at all repugnant to U.S. law.

6 BankBoston -- and again, we learned this through the  
7 evidentiary submissions made by Bank of America -- clearly  
8 knew that its claims could be subject to the *data certa*  
9 requirement, but they chose not to comply with it.

10 And BankBoston has further acknowledged that the  
11 Clawback counterclaim, or Clawback claim of Dr. Bondi, should  
12 be litigated in Italy so that even if the *data certa*  
13 objection were overcome or withdrawn, BankBoston would still  
14 not be entitled to a distribution unless it prevailed in the  
15 Clawback litigation before the Parma -- excuse me -- before  
16 the Parma Court.

17 And again, BankBoston, like Bank of America, and  
18 specifically BankBoston, has argued in the Italian Court  
19 against the application of *data certa* for a variety of  
20 reasons. They're entitled to make evidentiary submissions to  
21 satisfy it, but they've also argued it's inapplicable,  
22 they've argued it's unreasonable and not valid, and,  
23 basically, making the same arguments they're making here.  
24 So, again, they thought this was an issue that could be  
25 resolved by the Italian Court and it should be resolved by

1 the Italian Court.

2 I'd like to come back to another point raised  
3 specifically by Bank of America. And this goes to the issues  
4 regarding the just treatment of creditors, any particularized  
5 harm to U.S. creditors. As I pointed out, Bank of America is  
6 not talking about creditors generally, but itself.

7 And they have also claimed that they've been treated  
8 unfairly vis-a-vis other creditors because Dr. Bondi has  
9 chosen to settle with some creditors, but not with them.  
10 Every claim, every objection is different. It's no different  
11 than a U.S. Chapter 11 situation. As to Bank of America, I  
12 think it's fairly clear that they are different from every  
13 other creditor. They certainly don't have -- well,  
14 certainly, Dr. Bondi does not have an obligation to settle  
15 all disputed claims, to settle with one party on the same  
16 terms that he may have settled with another party. There are  
17 always differences between the parties.

18 And in the case of Bank of America, we're talking  
19 about a litigation adversary. And litigation adversaries  
20 prosecute whatever they can, just as Bank of America has done  
21 whatever it can to object and further its objection in this  
22 proceeding.

23 So, Your Honor, the claims litigation between Dr.  
24 Bondi and Bank of America, even the objection to claims, is  
25 all about who was the cause of the fraud. It's a fundamental

1 issue in the Italian case. And, frankly, that's the reason,  
2 and I come back to the standing issue, that at least as to  
3 Bank of America's specific claims, they belong in front of  
4 Judge Kaplan.

5           So despite all the noise and moving back to the  
6 general issue of *data certa*, which isn't unique to Bank of  
7 America, we do not believe that any of the objectors who  
8 raised the *data certa* issue have been persuasive that this is  
9 a provision that makes Italian bankruptcy law unworthy of  
10 comity, that this is a provision that is repugnant to U.S.  
11 bankruptcy law. It's not even, as I said, a provision of  
12 Italian bankruptcy law.

13           I think that what we have here, particularly in the  
14 case of ABN AMRO and also with respect to Bank of America,  
15 lenders complaining that they haven't had their claims  
16 admitted. They're still pending. The Parma Court may very  
17 well admit them, or they may not. But the issue of  
18 unfairness, of a repugnant provision of law, of any  
19 inappropriate conduct on the part of Dr. Bondi just isn't  
20 there.

21           Your Honor, should we discuss Bank of America's  
22 objections to the form of injunction, or should I talk about  
23 the PBGC? I can go -- we can do it in either order. And I  
24 also wanted to bring the Court up to date on the status of  
25 the settlement with the Bingham noteholders.

1 THE COURT: Okay. Why don't we stick with the form  
2 of injunction first?

3 MS. GOLDSTEIN: Okay.

4 THE COURT: Because I had some questions on that,  
5 too.

6 MS. GOLDSTEIN: Okay.

7 THE COURT: And then go back to the other objectors.

8 MS. GOLDSTEIN: Sure.

9 THE COURT: I expect you're going to get to this  
10 anyway, but in light of the standing -- the position of Dr.  
11 Bondi on standing, what is the -- explain to me the rationale  
12 for not including in the injunction a paragraph dealing with  
13 B of A and BASL that is along the same lines as Paragraph 8  
14 that deals with Grant Thornton.

15 MS. GOLDSTEIN: Your Honor, I think the injunction  
16 already excludes everything that is subject to the withdrawal  
17 order. But there have been --

18 THE COURT: But doesn't that order apply equally to  
19 Grant Thornton?

20 MS. GOLDSTEIN: No. There's a general withdrawal  
21 order. And then with respect to Grant Thornton, I think  
22 there were specific orders entered as to what could be  
23 asserted in that case.

24 (Counsel confer.)

25 MS. GOLDSTEIN: The language proposed by Bank of

1 America includes things that have not been ruled on,  
2 including impleader, for example, by Judge Kaplan. He hasn't  
3 determined that any parties could be -- any impleaders could  
4 be made with respect to Bank of America, and he's already  
5 decided on a counterclaim. But I think, Your Honor, if we  
6 keep exactly --

7 THE COURT: But I guess maybe this is a way to get  
8 back to the standing issue, then. As long as that's still an  
9 open issue and that's still sought to be enjoined, don't they  
10 have standing to complain?

11 MS. GOLDSTEIN: Well, they haven't asked for that  
12 here, to my knowledge. I think -- no, Your Honor --

13 THE COURT: But what I'm saying is that, you know --

14 MS. GOLDSTEIN: Well, Judge Kaplan has basically --

15 THE COURT: In other words, Judge Kaplan's orders  
16 don't deal with every potential issue B of A could have, or  
17 else there wouldn't be any issue with putting in similar  
18 language to the Grant Thornton paragraph.

19 MS. GOLDSTEIN: His orders cover everything that  
20 they could raise, but he hasn't decided everything. So if  
21 you look at what B of A has proposed, it's as though Judge  
22 Kaplan has decided that they're entitled to those things. He  
23 hasn't.

24 But if they wanted to assert anything in connection  
25 with the District Court action, that request would have to go

1 to Judge Kaplan. He has an injunction in effect, other than  
2 what he's allowed.

3 THE COURT: But doesn't this Grant Thornton just  
4 apply only to assertion, assertion of these things?

5 MS. GOLDSTEIN: He's allowed them to assert those  
6 things. He has not allowed Bank of America to assert all of  
7 the same things. So they -- if they were to make a motion --  
8 like when they sought to have --

9 THE COURT: But maybe this is where I'm not  
10 following you. Are they precluded from making such a motion?

11 MS. GOLDSTEIN: They can make a motion to do  
12 anything with respect to their claims before Judge Kaplan.

13 THE COURT: So they can make a motion to assert an  
14 impleader action beforehand?

15 MS. GOLDSTEIN: They'd have to seek to modify the  
16 injunction as it exists before him. He has the injunction in  
17 place, but for --

18 THE COURT: But what injunction has he issued?

19 MS. GOLDSTEIN: He relies on your injunction, Your  
20 Honor. I mean, if you read his --

21 THE COURT: But that would be this injunction,  
22 right? That would be this permanent injunction.

23 MS. GOLDSTEIN: But we exclude his withdrawal. All  
24 matters subject to his withdrawal.

25 THE COURT: But you're still saying they would have

1 to seek relief from this permanent injunction to then go ask  
2 him for something?

3 MS. GOLDSTEIN: No, I don't believe they have to  
4 come back to you, Your Honor, because he's already -- this  
5 permanent injunction cannot affect anything that's before  
6 him. So it can't affect -- that's why I said, Your Honor,  
7 they could go assert these claims.

8 THE COURT: Well, that's why it seemed to me that  
9 going with the same language in Paragraph 8 would clear up  
10 any confusion about that.

11 MS. GOLDSTEIN: Your Honor, that --

12 THE COURT: You know, maybe you spent hours going  
13 through this and there's something more specific about it,  
14 but it just seemed to me that that way people wouldn't have  
15 to parse through this transcript and they'd have one simple  
16 paragraph that would make it clear that in that litigation  
17 they're free to ask for or assert subject to his  
18 determination of whether it should be asserted or not.

19 MS. GOLDSTEIN: Well, maybe we have to add  
20 additional language. The Grant Thornton matter is before  
21 him. Each matter has different motions in it. But  
22 everything having to do with the Grant Thornton litigation or  
23 the Bank of America litigation is subject to that partial  
24 withdrawal.

25 And we have in the permanent injunction order -- let



1 me just make sure I have the right paragraph here.

2 (Counsel confer.)

3 MS. GOLDSTEIN: I mean, if you look at Paragraph 8,  
4 it's all about Grant Thornton. All the specific cites of his  
5 rulings are specific to Grant Thornton. So if we want to  
6 list rulings that are specific to Bank of America, we could  
7 put in a Bank of America paragraph. But it's not the same.

8 THE COURT: Well, you just -- instead of the  
9 italicized references to civil proceedings involving Grant  
10 Thornton, you can put in the italicized references to civil  
11 proceedings involving B of A in front of Judge Kaplan.

12 MS. GOLDSTEIN: Right. But except that in the B of  
13 A situation he has allowed only the assertion of defenses and  
14 compulsory counterclaims.

15 THE COURT: So you're saying he specifically allowed  
16 in any manner the assertion of defenses, counterclaims,  
17 cross-claims or impleader actions or any other actions?

18 MS. GOLDSTEIN: In the Grant Thornton orders, yes,  
19 Your Honor.

20 THE COURT: They have complete freedom to do  
21 anything?

22 MS. GOLDSTEIN: Just what it says here in their  
23 litigation.

24 THE COURT: So he's made sort of a blanket ruling  
25 that they can assert anything?

1 MS. GOLDSTEIN: Your Honor --

2 MR. COMET: Your Honor, can I just interject  
3 something? The major difference between what is in here  
4 regarding Grant Thornton and what Bank of America proposed is  
5 that the paragraph regarding Grant Thornton begins by saying,  
6 "To the extent the District Court has withdrawn --"

7 THE COURT: No, I'm saying if you do the same  
8 language completely, including that to the extent --

9 MR. COMET: I think that may well be doable, Your  
10 Honor. But that was not what Bank of America proposed.

11 MS. GOLDSTEIN: Right.

12 MR. COMET: They proposed --

13 THE COURT: Well, that's what I read their objection  
14 as saying, we want the same language as Paragraph 8.

15 MS. GOLDSTEIN: Well, the language they gave us,  
16 Your Honor, is not the same.

17 MR. COMET: But that wasn't the specific language  
18 they proposed. They proposed language that said -- and this  
19 is Howard Comet, Your Honor. They proposed language that  
20 said that -- made no reference to the withdrawal of the  
21 reference. It simply said, notwithstanding any provision of  
22 the permanent injunction they can assert whatever they want.

23 THE COURT: Okay. Well, that's a different point.  
24 But as far as if you just stuck with the language of  
25 Paragraph 8, but, instead of the litigations with Grant

1 Thornton in the title, you put the ones that were B of A's,  
2 that would be okay?

3 MS. GOLDSTEIN: I think we -- as long as we replace  
4 the reference to the Grant Thornton orders with the Bank of  
5 America orders so it's specific to them.

6 THE COURT: Okay. I mean, Mr. Krakauer can tell me  
7 if that's sufficient or not for him. But at least that will  
8 help him understand the standing issue. Okay.

9 MR. KRAKAUER: And, Your Honor, I'm not even  
10 understanding what they just agreed to. I think --

11 THE COURT: They agreed to the same language as 8,  
12 except instead of referring to Grant Thornton, it would refer  
13 to B of A and BASL.

14 MR. KRAKAUER: Okay. I didn't hear them say, but if  
15 that's what you heard, that's fine.

16 THE COURT: I think that's what Mr. Comet said,  
17 right?

18 MR. COMET: Yes, sir.

19 THE COURT: Okay. All right.

20 MS. GOLDSTEIN: Okay. I'm sorry, Your Honor.

21 Then on the form of the order, you wanted to talk  
22 about the applicability of the injunction to direct claims  
23 against non-debtors?

24 THE COURT: Yes. There are -- as I read it, there  
25 are five provisions of the order that deal with non-debtors.

1 And I read three of them as being quite broad. But what you  
2 said this afternoon suggests maybe they shouldn't be.

3 Let me deal, first, with the ones that I think are  
4 not problematic at all, and those are -- if you turn to Page  
5 8.

6 MS. GOLDSTEIN: Okay.

7 THE COURT: And, by the way, for the record, as part  
8 of the pretrial procedures for this hearing, I instructed  
9 Parmalat to file and serve the proposed order, now several  
10 months ago, so that everyone interested would see the  
11 specific relief that was being sought, and that's the  
12 proposed order that I'm working off of here.

13 MS. GOLDSTEIN: Yes, Your Honor. We have not made  
14 any changes to that, but for the date.

15 THE COURT: Okay. So if you go to Page 8 --

16 MS. GOLDSTEIN: Your Honor, are you working with the  
17 order that was attached to our memorandum that we filed?

18 THE COURT: Well, we'll know in a second.

19 MS. GOLDSTEIN: Okay.

20 THE COURT: I think so.

21 MS. GOLDSTEIN: Okay. And could --

22 THE COURT: Page 8, Paragraph 3(d) says that the  
23 injunction goes to commencing or continuing any action or  
24 legal proceeding against the composition debtors or their  
25 successor reorganized Parmalat. And then it says:

1           "-- or any of their subsidiaries or affiliates or  
2           any of their property or proceeds thereof:" --

3           And then let me skip down to Roman (ii) and (iii).

4           MS. GOLDSTEIN: Okay.

5           THE COURT: Which, again, I don't think are -- which  
6           are quite narrow, I think, and subject to being convinced

7           otherwise, are within the Schimmelpennick and Garcia  
8           Avila holdings, where it says:

9           "-- that arises in relation to or in connection with  
10          the implementation of the composition, including,  
11          without limitation, each and every liability in  
12          respect of a claim that is subject to the  
13          composition where such action would interfere with  
14          the Italian proceedings in granting full force and  
15          effect to the composition."

16          So, there, you're enjoining actions against subs  
17          where it's on account of -- or arises in connection with  
18          implementation of the composition. So people are basically  
19          trying to blow up the composition by going against the  
20          subsidiaries.

21          MS. GOLDSTEIN: Right.

22          THE COURT: And that, to me, would certainly fall  
23          within the definition of, "included within the foreign  
24          proceeding."

25          And then (iii) says:

1           "-- in respect of any claim or cause of action,  
2           which may arise out of the construction or  
3           interpretation of the composition, or out of any  
4           action taken or omitted to be taken by any other  
5           composition debtors in connection with the  
6           administration of the composition."

7           So, again, it goes to channeling these actions  
8           basically back to the Italian Court, which implemented the  
9           composition in the first place.

10           But if you look at Roman (i) there, to me it seems  
11           to simply enjoin any cause of action against a subsidiary or  
12           affiliate, a non-debtor subsidiary or affiliate, in respect  
13           of a claim or cause of action -- well, I'm sorry. This is  
14           all in connection with the implementation of the composition.  
15           So that would be a no-brainer, too. I'm sorry. Let me focus  
16           back, then, on the ones that I thought were problematic  
17           because I just didn't understand -- or I thought the language  
18           was somewhat ambiguous.

19           If you look at 7, and this somewhat similar language  
20           is on 6 also -- let's go to 6. 3(a), "enjoins the  
21           commencement of any action or legal proceeding against --"  
22           and you go down about halfway down that paragraph -- "against  
23           any of their subsidiaries or affiliates."

24           MS. GOLDSTEIN: Your Honor, which paragraph are we  
25           on?

1 THE COURT: 3(a) on Page 6.

2 MS. GOLDSTEIN: Okay. Mine doesn't have page  
3 numbers.

4 THE COURT: Enjoins actions against subsidiaries or  
5 affiliates, non-debtor subsidiaries or affiliates.

6 "-- if such action or proceeding asserts a claim  
7 that is subject to the composition, or otherwise  
8 subject to the foreign debtors' insolvency  
9 proceedings."

10 And I just -- what do you mean by the phrase  
11 "subject to"? Maybe I could give you an example. If someone  
12 has asserted a guarantee claim against one of the composition  
13 debtors, but the primary obligation is of a foreign debtor,  
14 would this prevent the --

15 MS. GOLDSTEIN: No, we do not believe so, Your  
16 Honor, because that primary obligation is not the subject of  
17 the composition.

18 THE COURT: Okay.

19 MS. GOLDSTEIN: So what we're really trying to  
20 address here is a collateral attack in some way on a claim or  
21 -- you know, or some action that really perhaps should have  
22 been brought against the composition debtors, but is being  
23 brought and -- against a non-debtor. And I think that by  
24 saying, "subject to the composition," we intended to exclude  
25 a direct claim against a non-debtor affiliate.

1 THE COURT: Okay.

2 MS. GOLDSTEIN: Now if we can clarify that in a  
3 better way, we'd be happy to.

4 THE COURT: Well, I guess in my mind that leaves  
5 another issue, which is where you have "joint and several  
6 liability." And I guess that's the PBGC's issue.

7 MS. GOLDSTEIN: Uh-huh.

8 THE COURT: And how does this -- I mean, if you --  
9 and I don't know whether there are any contractual claims  
10 like that, that B of A or BASL has, but as far as enforcing  
11 the injunction, I think this -- I would like to clear up any  
12 ambiguity on that so that people would know if they did have  
13 joint and several liability claims whether this would enjoin  
14 them from proceeding against a non-debtor entity or not.

15 MS. GOLDSTEIN: Well, clearly, the -- can we use the  
16 PBGC as an example? Clearly, they have a -- well, they have  
17 a contingent claim against the -- the basis for the claim is  
18 Parmalat USA confirmed their Chapter 11 plan, their pension  
19 plans are still in place, and so, at this point, if there  
20 were a termination of the plan, that results in a potential  
21 claim against the parent. And that claim is really what the  
22 PBGC is talking about here.

23 There is -- we do not believe that this provision  
24 stops them from proceeding directly against Parmalat USA.

25 THE COURT: Okay.



1 MS. GOLDSTEIN: But if they were to proceed against  
2 Parmalat S.p.A. --

3 THE COURT: That would be subject to the Italian  
4 proceeding.

5 MS. GOLDSTEIN: -- that's subject to this  
6 injunction, and they would have to proceed in Italy, if they  
7 ever have a claim. And that's no different, Your Honor, than  
8 if this happened outside of a 304 or a Chapter 11.

9 THE COURT: So, just to use another example, if  
10 someone entered into a loan agreement with one of the  
11 composition debtors and one of the non-debtor subs, and they  
12 were both jointly and severally liable for that loan, this  
13 injunction would enjoin them from proceeding against the  
14 parent because the parent is in the -- that claim is dealt  
15 with in the composition. But they could still proceed  
16 against the sub?

17 MS. GOLDSTEIN: My view, Your Honor, is yes, because  
18 a joint and several obligation, at least my understanding is  
19 that that creates a direct claim against both entities. I  
20 think if it helps, I mean, we can, you know, put a  
21 parenthetical in that this is not intended to enjoin a direct  
22 claim against these affiliates.

23 THE COURT: All right. Well, let me ask you one  
24 last question.

25 MS. GOLDSTEIN: Okay. I didn't mean to cut you off,

1 Your Honor.

2 THE COURT: I'm not sure that "direct" solves it  
3 all, because what if you have a -- made a loan to one of the  
4 composition debtors that has been guaranteed by one of the-  
5 non-debtor subsidiaries?

6 MS. GOLDSTEIN: That's a direct claim, too. Go  
7 ahead.

8 THE COURT: Well, the -- obviously, the claim  
9 against the composition debtor would be enjoined. You  
10 wouldn't be able to enforce that claim as that claim against  
11 the non-debtor sub. But I'm assuming you could enforce the  
12 guarantee against the non-debtor sub.

13 MS. GOLDSTEIN: You could enforce the guarantee,  
14 which creates an independent claim.

15 THE COURT: Well, so maybe the language is an  
16 "independent" obligation as opposed to a derivative or veil-  
17 piercing or some other type of obligation, which I think  
18 would clearly be subject to the foreign proceeding.

19 MS. GOLDSTEIN: Right. That was, Your Honor, what  
20 we were trying to get at by saying it was subject to the  
21 composition. But we could make it clear that an independent  
22 claim against --

23 THE COURT: Right.

24 MS. GOLDSTEIN: -- the non-debtor affiliates is not  
25 intended to be covered.

1 THE COURT: Okay. So, again, if they're trying to  
2 get at the affiliate on a veil-piercing theory, or something  
3 like that, or simply saying that it's liable for the  
4 obligations of the parent on a non-independent basis, then  
5 this would be enjoined --

6 MS. GOLDSTEIN: This would be enjoined.

7 THE COURT: -- but, otherwise, they'd be free to  
8 pursue it.

9 MS. GOLDSTEIN: Yes.

10 THE COURT: Okay. And I'm assuming that's the same  
11 with regard to 3(b) on Page 7, which says:

12 "If the enforcement of such judgment, assessment,  
13 order, or award is based on a claim that is subject  
14 to the composition."

15 It's the same concept there.

16 MS. GOLDSTEIN: Yes. Yes. And we can make that  
17 clarification.

18 THE COURT: Okay. Okay. All right.

19 MS. GOLDSTEIN: Your Honor, there are other  
20 provisions, I think, which Bank of America objected to -- let  
21 me just go to my notes -- which deal with asserting setoffs.  
22 You know, again, as to Bank of America, that's dealt with in  
23 the District Court action. They can and have asserted  
24 setoffs. No other creditor is complaining about that  
25 provision, and we don't see a basis to change that.

1           And also, I think their other issue was trying to  
2 limit the extraterritorial aspect of this order. And it just  
3 seems to me that this order, the Bankruptcy Code does not  
4 limit this Court's jurisdiction to enter orders that have  
5 extraterritorial effect. And it would seem to me incongruous  
6 to enter a permanent injunction, but then a creditor that is  
7 subject to the jurisdiction of this Court can then go and  
8 feel free to assert a claim anywhere else. The local court  
9 will decide whether this Court's order has extraterritorial  
10 effect, and I know that there's some risk to that. But the  
11 concept of channeling the claims to Italy and the provision  
12 that we have put in our order with respect to the effect of  
13 this order work together.

14           If Bank of America or some other creditor went and  
15 tried to pursue the foreign debtor's assets in Spain, for  
16 example, why shouldn't we be able to assert that this  
17 injunction precludes that? The Spanish court may say, no,  
18 sorry. But that risk is there, it's always there. It's just  
19 like the question of the automatic stay.

20           But this Court has jurisdiction over these  
21 creditors, and I think that to accomplish the objective of  
22 this 304 case and the permanent injunction, that provision is  
23 necessary; the ability to promote and further the channeling  
24 of these claims to the Italian Court. It's not inconsistent  
25 with the powers of this Court.

1           THE COURT: Well, let me -- I have some question  
2 about that. First, based on my reading of the Italian law  
3 and also the case out of Florida that you mentioned earlier  
4 that had an analysis of the Italian law for purposes of 304  
5 relief, there is a worldwide stay under Italian law, right?

6           MS. GOLDSTEIN: Yes, Your Honor.

7           THE COURT: So ...

8           MS. GOLDSTEIN: But then, Your Honor, we wouldn't  
9 need this proceeding if we could rely entirely on that  
10 worldwide stay.

11          THE COURT: Well, but with regard to any creditor  
12 where -- over whom I'd have jurisdiction, such as B of A, if  
13 B of A violated that Italian stay, wouldn't the foreign  
14 debtors have suitable relief here, which is they could come  
15 to any court in the United States and say that that result or  
16 that conduct should be sanctioned here; either there's a  
17 judgment first in Italy that should be enforced here for  
18 breach of that stay, or that it should be declared to be in  
19 breach here, the district courts here or the New York courts  
20 should grant comity and enforce that determination of the  
21 Italian law and court? It just seems to me that there is  
22 some risk to have an ancillary court, such as this one is,  
23 granting a worldwide injunction that then -- where it's not  
24 the home court, particularly where the home court has one to  
25 be enforced.

1 I'm thinking, for example, of -- I don't know  
2 whether this is the case, but I assume that if I granted a  
3 worldwide injunction as to U.S. parties, or parties that I  
4 have personal jurisdiction over, that would prevent them  
5 from, for example, pursuing claims, that might be subject to  
6 the composition, pursuing them in the Eurofoods bankruptcy in  
7 Ireland, there would be quite an outcry.

8 MS. GOLDSTEIN: I think we -- but, Your Honor, we've  
9 already --

10 THE COURT: Well, I'm just using that as a  
11 hypothetical.

12 MS. GOLDSTEIN: Yeah.

13 THE COURT: I mean I'd be, in essence, treading on  
14 another court's toes when I wasn't even the main court.

15 MS. GOLDSTEIN: Well, you're --

16 THE COURT: And the other concern I have is this:  
17 Obviously, I have jurisdiction over a lot of the creditors  
18 here; on the other hand, I don't have jurisdiction over all  
19 of the creditors. So it seems to me there's a risk here that  
20 if I do enter an injunction that purports to have worldwide  
21 effect, I'm disadvantaging the creditors -- the U.S.  
22 creditors or those who do business here, as against those who  
23 don't, which is, you know, a corollary effect to the main  
24 concern I have, which is the type of concern that underlies  
25 anti-suit injunctions, generally.

1 I mean, if you could show me that basically everyone  
2 was here, then -- or almost everyone was here, or that it  
3 would be necessary because of the type of business that the  
4 debtor had -- for example, a worldwide shipping business  
5 where you would need immediate relief, because if a vessel is  
6 arrested it kills the business, such a worldwide injunction  
7 might make sense, even though I wasn't the home court.

8 But here, it seems to me, particularly given that  
9 Italy has a worldwide injunction, and it is subject to the  
10 E.U. scheme, so there's a lot of coordination anyway, and I  
11 would have no problem, and I don't think other U.S. Courts  
12 would have any problem enforcing -- if there was a breach of  
13 an Italian injunction -- through principles of comity,  
14 something here; that it seems to me that that's a safer way  
15 to go than just sort of generally issuing a worldwide  
16 injunction.

17 MS. GOLDSTEIN: Your Honor, I would --

18 MR. KRAKAUER: Your Honor, can I just say, on all  
19 these points; all the scope points as well as the *data certa*,  
20 I obviously have a number of things to say. Should I save  
21 them all to the end or -- I mean, because we are --

22 THE COURT: Well, I mean we're kind of covering this  
23 one now, so if you have anything more to add, you should  
24 chime in.

25 MR. KRAKAUER: I --

1 THE COURT: And I've read your papers, I've thought  
2 about the issues, but ...

3 MR. KRAKAUER: Yeah. Well, let me address a few of  
4 the -- I mean, as far as extraterritorial relief, I mean  
5 there's a few points which are directly on point.

6 I mean, one is all the China Trade --

7 THE COURT: The anti-suit injunction cases.

8 MR. KRAKAUER: Yeah. I mean, you basically have a  
9 very high --

10 THE COURT: Stand up.

11 MR. KRAKAUER: Oh, I'm sorry.

12 You have a very high legal standard and very  
13 stringent test to even consider an injunction outside the  
14 United States. And there's a recent case, I think it's  
15 called "Sea Carriers," which basically applied China Trade in  
16 a 304 context. There is no factual basis here -- I mean,  
17 there is none at all, in terms of a factual presentation on  
18 the need for a foreign injunction. That's one point.

19 Second is some of the things we're talking about  
20 here, in terms of scope issues relating to issues related to  
21 non-debtor subsidiaries, relating to counterclaims, setoffs -  
22 - which we'll get to -- and such, are not what the plan in  
23 Italy provides. You have a situation where you have a plan  
24 that says one thing, and there's a set of Italian laws that  
25 say one thing, and the debtor is coming in to this court and



1 saying, you know, there's something else I'd really like to  
2 have, even though I didn't ask for it or get it anywhere  
3 else.

4 THE COURT: Well, but as far as the worldwide scope,  
5 isn't it the case, though, that under Italian law there is  
6 worldwide protection?

7 MR. KRAKAUER: I agree. I don't think there's any  
8 need whatsoever for worldwide scope here. I think the  
9 Italians certainly intend that their orders would apply  
10 extraterritorially. There are certainly E.U. procedures,  
11 E.U. regulations and such, which deal with how Italian  
12 procedures deal in other places around Europe, where most of  
13 these -- probably a lot of these would wind up coming up.

14 You know, we litigated -- you know, Bank of America  
15 and Parmalat were the two entities, along with the trustee,  
16 and a receiver in Ireland who liquidated the Eurofoods case  
17 up to the E.C.J., and it dealt with -- one of the issues it  
18 dealt with is how you deal with all these issues of one set  
19 of laws in one place and differences within the E.U.

20 You don't -- you know, for the U.S. Court to get in  
21 the middle of that, and if we have something coming up in the  
22 future that's -- you know, pick a country; France, England,  
23 whatever, and you have an English court that sits there and  
24 tries to figure out, okay, I had a U.S. judge tell me he's  
25 issuing an order that's supposed to have extraterritorial

1 effect, I have an Italian Court that has issued something  
2 completely different, and then we have our set of laws and  
3 E.U. regs in whatever country we're in, I mean, it's a  
4 horrible mess. There's no reason for it whatsoever, I mean  
5 none. And why you would -- why they would suggest --

6 THE COURT: Well, I could see instances where there  
7 would be a reason for it, but --

8 MR. KRAKAUER: Not this one.

9 THE COURT: -- but I'm not sure here, particularly  
10 where I think we would, in the U.S., assist -- if someone did  
11 breach the Italian discharge or injunction, we would assist  
12 them, we would assist the reorganized debtors in enforcing an  
13 order on -- you know, that would sanction that breach. But  
14 anyway ... okay.

15 MR. KRAKAUER: And on these other scope points, I'll  
16 wait until the end, if you want.

17 THE COURT: Well, I think -- well, on the -- we  
18 spent some time clarifying the provisions of the proposed  
19 order that deal with non-debtor subsidiaries. And having  
20 heard the clarification, and I guess subject to seeing the  
21 language which covers -- I think we decided -- or excludes  
22 independent obligations, is there any remaining issue there?

23 MR. KRAKAUER: Well, certainly clarification that it  
24 excludes all direct obligations, independent obligations, is  
25 very helpful. But truthfully, I don't understand why this

1 Court gets into that issue at all in the following sense:

2 First, the Italian proceeding did not provide any  
3 protection for non-debtor subsidiaries as a matter of Italian  
4 law or pursuant to their plan.

5 Second, there are no present U.S. subsidiaries of  
6 Parmalat. There was one, Parmalat U.S.A. and Farmland to  
7 name two, were entities that Parmalat was affiliated with  
8 when this case started. They both went through their  
9 separate reorganizations, and Parmalat no longer is  
10 affiliated with those companies. They basically were  
11 transferred over to -- their ownership to the creditors. So  
12 there is not even any subsidiaries in the United States for  
13 this Court to deal with. So what we're doing here --

14 THE COURT: Well, but let me just test that.

15 MR. KRAKAUER: Sure.

16 THE COURT: What if Judge Kaplan determines that  
17 someone in the MDL defrauded, not only one of the composition  
18 debtors, but also one of the subs, and they have to pay a sub  
19 -- I guess originally the check is here, someone could  
20 assert, you know, a lien on that right here. I mean,  
21 shouldn't they get that protection from -- or creditors  
22 generally, shouldn't they be enjoined from latching on to  
23 that litigation receivable here, asserting that, well, we  
24 have a claim against that sub, too, because it was all one  
25 big fraud case?

1 MR. KRAKAUER: Well, none of the subs -- the only  
2 subs that are parties -- the only Parmalat-related subs that  
3 are parties to the MDL litigation at this point are the  
4 foreign debtors; none other are. So what your hypothesizing  
5 is not --

6 THE COURT: Well, I --

7 MR. KRAKAUER: -- what's occurring. It's a  
8 hypothetical off in the future, not based upon any facts.

9 But I guess the real point is, you know, I have  
10 problems of it wasn't provided for in Italy, I have problems  
11 of why we're dealing with this --

12 THE COURT: Well, let's turn to that latter point.  
13 And I think this is basically -- well, when you say it's not  
14 provided for in Italy, I don't think you have to provide for,  
15 you know, worldwide relief, necessarily, in your plan because  
16 it's just a function of the law.

17 MR. KRAKAUER: Well, it's not as a matter of Italian  
18 law --

19 THE COURT: I mean, you don't actually have to put  
20 in a Chapter 11 plan that the debtor is getting a discharge.  
21 It just happens by operation of law. And 524 is out there to  
22 protect Chapter 7 debtors without there being -- so, you  
23 know, if Italian law provides for it, I don't think there's  
24 any reason not to provide for an injunction here, too.

25 MR. KRAKAUER: Your Honor, one of the things that I

1 suggested to deal with this point early on in the discussions  
2 with Weil Gotshal is just we made clear that there was  
3 protection for non-debtor subsidiaries to the extent provided  
4 under Italian law. Then we're not creating additional  
5 rights. And that, together with the clarification on  
6 independence really, frankly, solves our problem. I mean, I  
7 still don't know why we're getting into it, but that does  
8 solve the issue.

9 Because what I don't understand is why we would  
10 create new substantive rights in this court. It makes no  
11 sense in this particular context. There's just no basis for  
12 it.

13 THE COURT: Well, I guess I'm just -- on the  
14 particular point on the foreign subs, the non-debtor subs --

15 MR. KRAKAUER: Right.

16 THE COURT: -- I guess I don't see why it doesn't  
17 comply with Italian law.

18 MR. KRAKAUER: I don't -- and my basic problem with  
19 it is, frankly, illustrated by what you --

20 THE COURT: I mean, it's just a basic -- I'm sorry  
21 to interrupt you.

22 MR. KRAKAUER: You're not, no ...

23 THE COURT: But it's a basic principle that if one  
24 court has dealt with a claim, it seems perfectly appropriate  
25 to me to enjoin you as creditors or creditors here from

1 trying to go around that adjudication by, in essence,  
2 asserting the same claim against another entity that is here.

3 I understand -- I've agreed with you on the point  
4 about --

5 MR. KRAKAUER: Right.

6 THE COURT: -- about the extraterritorial effect.  
7 But as long as it's here, it seems to me it's perfectly  
8 consistent with 304 to say, I'm not going to get into that  
9 exercise of someone trying to go around the Italian Court's  
10 determination of a claim or adjudication of a claim by  
11 letting you say, well, I'm asserting it derivatively here  
12 against Company X.

13 MR. KRAKAUER: Yeah. Well, I -- I understand the  
14 point. I mean, if you're talking about -- you used the  
15 instance of a veil-piercing, where you're really suing  
16 derivatively. The problem -- I guess the basic problem I  
17 have at this point with the language, with these  
18 clarifications, is I guess illustrated by the colloquy you  
19 had with Ms. Goldstein for ten minutes. It's very difficult  
20 to understand what the heck the language really means.

21 THE COURT: But I think that's now been -- I mean,  
22 my sense is it's been clarified. We had this same issue in  
23 Refco. I mean Refco is a big fraud case. Everyone in the  
24 case said that every debtor was liable for my claims because  
25 you couldn't trace where the money went. The creditors very

1 sensibly put in the plan a provision that said, no, we're not  
2 going to have that type of claim, we're just having direct  
3 claims against our own debtors. That's basically -- and it's  
4 just sort of a common sense -- the way it's been worked out  
5 on the record, I think, is a proper way to resolve it.

6 MR. KRAKAUER: Well, Your Honor, I --

7 THE COURT: But can I turn to --

8 MR. KRAKAUER: Go ahead.

9 THE COURT: -- your other point?

10 MR. KRAKAUER: Right.

11 THE COURT: Which is related. Your point about --  
12 and when I say "your," it's probably best leaving aside  
13 anything on the standing issue, you're just wearing your  
14 BankBoston hat for a second -- is the point on setoffs,  
15 liens, et cetera.

16 MR. KRAKAUER: Right.

17 THE COURT: Your point is that I shouldn't be  
18 enjoining something that's permitted under Italian law?

19 MR. KRAKAUER: Well, on that I have at least three  
20 separate points:

21 One is that it's permitted under Italian law, and  
22 it's been conceded on the record.

23 Second, under Treco, I think Treco says that if you  
24 have a right of setoff, if somebody comes after you and you  
25 have a counterclaim that you want to assert for purposes of

1 setoff, you have the ability -- that's treated as a secured  
2 claim and you can't destroy that right.

3 THE COURT: Well, in Treco they actually had a lien.

4 MR. KRAKAUER: Well, but I think a setoff right is a  
5 lien; it is under 506. I mean, you're creating -- I don't  
6 think there's a distinction -- a legal distinction between  
7 that. If somebody has the ability to say, you sue me for  
8 \$1,000 and I have the ability to counterclaim because you owe  
9 me \$1,000 at the same time, I think Treco absolutely stands  
10 for the proposition that you can't destroy that right. So  
11 that's what -- so you got Treco.

12 You got the fact the Italian Courts, it undisputed,  
13 and Italian law doesn't prohibit it.

14 And then the third thing is you have the fact that  
15 Judge Kaplan in this district has specifically ruled on the  
16 issue in connection with his litigation. He said basically  
17 that he agrees that a defendant who Parmalat sues has a right  
18 to counterclaims and setoff.

19 Now, obviously, that applies for this present  
20 litigation. But from what they -- given that that's what you  
21 have at least one district court judge determining the law  
22 is, on what basis do you say that if somebody gets sued --  
23 and you asked me to put on my BankBoston hat -- if BankBoston  
24 gets sued six months from now, that we don't have the right  
25 to do exactly what Judge Kaplan said the defendants in the



1 MDL had the right to do, which is to assert a counterclaim  
2 for setoff purposes.

3 THE COURT: All right.

4 MR. KRAKAUER: How do you --

5 THE COURT: No, I -- okay. I'm somewhat confused  
6 about the debtors' position on this point. Is Dr. Bondi  
7 looking literally simply to channel setoff claims to the  
8 Italian Court, or is he looking to just prevent any claim  
9 ever being asserted?

10 MS. GOLDSTEIN: Your Honor, this injunction is a  
11 channeling injunction. It cannot -- the words do not  
12 preclude setoff; they enjoin it. But if a party wishes to  
13 assert it in Italy, this would not be applicable. This is  
14 channeling claims to Italy.

15 THE COURT: Okay. It's not clear to me from the  
16 language that that's what it does.

17 MS. GOLDSTEIN: I mean, even in the U.S. --

18 THE COURT: I mean, I think that is --

19 MS. GOLDSTEIN: -- the Court has to allow the setoff  
20 at some point, so ...

21 THE COURT: If you had -- it would seem to me that  
22 if you were to do that, then you'd actually -- when you're  
23 talking about creating, perfecting, or enforcing any liens,  
24 setoff, garnishment, et cetera, you'd put in a proviso that  
25 such injunction shall not exceed the relief accorded to the

1 foreign debtors under the composition or the law governing  
2 the liquidating debtors' liquidations, and that you're -- and  
3 then I think later, at the end of all this, I might add a  
4 proviso to make it clear -- this is right before -- at the  
5 end of Paragraph 3, which would say:

6           Provided in each instance, in respect to this  
7 Paragraph 3, such injunction shall not apply to any action to  
8 enforce such claim, lien, setoff, garnishment, or attachment,  
9 or any other right pursuant to the terms of the composition,  
10 or, you know, the law governing the liquidating debtors'  
11 liquidations.

12           MS. GOLDSTEIN: In Italy, Your Honor?

13           THE COURT: In the Italian Court or in the foreign  
14 court.

15           MS. GOLDSTEIN: All right. Now we have in Paragraph  
16 7 of the order a provision currently that says nothing in  
17 this order is intended to limit the jurisdiction of the Parma  
18 Court.

19           THE COURT: I know, I know. But I think it's kind  
20 of -- I'd rather have it said twice, so that people know that  
21 the injunction is subject to that.

22           MS. GOLDSTEIN: Okay. Okay. And we can do that,  
23 and --

24           MR. KRAKAUER: Your Honor, just to be clear. What  
25 Judge Kaplan ruled in his case is that when Parmalat comes

1 over to the United States and sues somebody here, that  
2 defendant here in the United States has the ability to assert  
3 a right of setoff and to assert its counterclaims in the U.S.  
4 Court as a defense of that or in response to that  
5 counterclaim. So I think what this has to provide is that  
6 this happens if any situation like that happens in the  
7 future; that this same -- that any defendant has a right to  
8 seek the same rights that the defendants were given before  
9 Judge Kaplan. I mean, how can -- that's the law -- I mean,  
10 that's what Judge Kaplan said the law was in this district,  
11 and I --

12 THE COURT: Well, he's not alone.

13 MR. COMET: Your Honor --

14 THE COURT: If Grant Thornton hadn't moved to  
15 withdraw the reference, that's what I would have held, too.

16 MR. KRAKAUER: Well, but that's -- but all I'm  
17 saying is this -- I think that's appropriate. But this order  
18 should be clear that it doesn't prevent that. That's --

19 MR. COMET: Your Honor, this is Howard Comet. That  
20 is not an accurate characterization of what Judge Kaplan  
21 ruled. He ruled under the circumstances of the specific case  
22 before him.

23 THE COURT: No, but what I'm saying, there should be  
24 an opportunity for judicial economy to have it not only in  
25 Italy, but also here. It depends on the circumstances.

1 MR. COMET: I agree, Your Honor. I thought Mr.  
2 Krakauer was saying this would be a blanket rule.

3 THE COURT: No. I think in the first instance you'd  
4 go to Italy, but you would have leave to ask the U.S. Court  
5 here to do it as far as -- I mean, the normal rule is you  
6 liquidate claims in the home court. But for purposes of  
7 judicial economy, courts frequently will say, look, if I'm  
8 going to be liquidating one claim here and this is closely  
9 related -- on the other hand, if it's a cross-claim that's  
10 already being liquidated in Italy or halfway through being  
11 liquidated, most courts will say, no, I'm not going to haul  
12 it over here. So there should be some flexibility there.

13 I think my take -- and again, you're covered on  
14 compulsory counterclaims -- my take is that, for things that  
15 are not compulsory, the rule should be you're directed to  
16 Italy, but free to seek relief here in the U.S. from that  
17 direction.

18 MR. KRAKAUER: Okay. So this order would make clear  
19 that the U.S. Court has the ability to give you that relief.

20 THE COURT: Well, to relieve you of the injunction's  
21 channeling you to Italy.

22 MR. KRAKAUER: Yes.

23 THE COURT: Yes.

24 MR. KRAKAUER: Okay. Which it doesn't now.

25 THE COURT: I understand.

1 MR. KRAKAUER: Okay.

2 THE COURT: Well, actually, the way -- that's not  
3 true. The way it was worded in Paragraph 7, I think you  
4 could have read it to say that there was that level of  
5 flexibility. But I kind of threw a monkey wrench into it by  
6 wanting it to be clearer here in Paragraph 3, and that led to  
7 our last colloquy. But I think that the record is clear on  
8 what it should say.

9 MR. KRAKAUER: Yeah. I mean, Paragraph 7 does not  
10 refer to the U.S. Court; it refers only to the Italian Court.

11 THE COURT: No. But it also doesn't say you must go  
12 to Italy; it doesn't say that, either. It just says nothing  
13 interferes with the Italian Court's jurisdiction, so ... this  
14 is going to be a little clearer, in that you're channeled to  
15 the Italian Court, but with leave to -- as far as cross-  
16 claims, counterclaims, et cetera, to seek --

17 MS. GOLDSTEIN: It would be to seek relief, Your  
18 Honor --

19 THE COURT: To seek relief from the injunction.

20 MS. GOLDSTEIN: -- in a court where the foreign  
21 debtors --

22 MR. KRAKAUER: From the U.S. Court.

23 MS. GOLDSTEIN: -- have commenced an action.

24 THE COURT: Correct.

25 MS. GOLDSTEIN: No other court.

1           THE COURT: Where the foreign debtors have commenced  
2 the action.

3           MR. KRAKAUER: Right.

4           THE COURT: Yeah.

5           MR. KRAKAUER: That's --

6           THE COURT: Yeah. And I expect that any U.S. Court  
7 would apply the law that says. generally, you have claims  
8 liquidated in the home bankruptcy court, but for principles  
9 of judicial economy and convenience, et cetera, you may have  
10 them all heard together under the right circumstances. Okay.

11          MS. GOLDSTEIN: Okay. I'm sorry, Your Honor. I  
12 have to go back to where we were. I think we've covered the  
13 issues regarding the form of the injunction, at least as far  
14 as I recall them.

15          THE COURT: I think you have, although I had a  
16 couple of questions on the form of it.

17          MS. GOLDSTEIN: Yes. Okay.

18          THE COURT: I think you have covered these issues.

19          MS. GOLDSTEIN: I have covered the Bank of America  
20 issues.

21          THE COURT: Right. There's a footnote on Page 7,  
22 Footnote 2 there. Is that accurate, still? Because it's  
23 something I'm supposed to be saying in the order.

24          MS. GOLDSTEIN: That is still accurate, Your Honor.

25          THE COURT: Okay.

1 MS. GOLDSTEIN: Amazing as that may seem.

2 THE COURT: Okay. And then if you turn to Page 9,  
3 Paragraph 5, Paragraph 6, and Paragraph 7 I take it are all  
4 agreed-to paragraphs with the parties who are referred to in  
5 this -- in each of these paragraphs? Does this reflect sort  
6 of an agreed-to formulation?

7 MS. GOLDSTEIN: Yes.

8 THE COURT: In the first case --

9 MS. GOLDSTEIN: I think this is the language we've  
10 always had.

11 (Counsel confer.)

12 MS. GOLDSTEIN: Yes. Your Honor, I think this  
13 language has been agreed to in connection with perhaps prior  
14 orders, as well.

15 THE COURT: Okay. And I guess maybe this is as good  
16 a time as any: Paragraph 7 refers to the Noteholders?

17 MS. GOLDSTEIN: Yes.

18 THE COURT: I don't see --

19 MS. GOLDSTEIN: No, you don't see anyone --

20 THE COURT: -- their counsel here today, which --

21 MS. GOLDSTEIN: That's good news.

22 THE COURT: -- I have to say I'm rather pleased  
23 about, although it's nice to seem them in a non --

24 MS. GOLDSTEIN: I'm sure somebody is here --

25 THE COURT: -- a non-court setting.

1 MS. GOLDSTEIN: -- but just a different face, Your  
2 Honor.

3 THE COURT: Oh, okay. All right. Not Mr. Flaschen,  
4 anyway.

5 (Laughter.)

6 THE COURT: I'm happy to see Mr. Flaschen out of  
7 court, but I'm glad he's not here today, since I assume that  
8 means you've reached some sort of agreement with the  
9 Noteholders.

10 MS. GOLDSTEIN: Yes, actually -- yes. Bingham still  
11 represents the Noteholders; it's just different -- as I said,  
12 a different face. But we have finalized all the settlement  
13 discussions with the Noteholders, with respect to the  
14 conditional claims. The documentation is complete. We  
15 expect full execution of the documents by the parties by the  
16 end of the month.

17 And, Your Honor, just to be clear, we don't expect  
18 any issues. But if any problem comes up, but which requires  
19 this Court's attention, then we jointly will seek an  
20 appropriate hearing, but we do not expect that to happen.

21 THE COURT: Okay. And as far as the order is  
22 concerned, this language in Paragraph 7 is -- you're not  
23 objecting to it.

24 MS. GOLDSTEIN: No. No, they are not -- yes. In  
25 fact, this was requested by the Noteholders, so they're not



1 objecting to it, and I guess you should hear --

2 THE COURT: Okay.

3 MS. GOLDSTEIN: One other point, Your Honor, before  
4 that. The list of notes that are covered by this settlement,  
5 which is on an exhibit that we have filed, and we filed with  
6 this Court on prior occasions, there is one change, which is  
7 that certain yen notes that were on the list have been taken  
8 off because it turns out they had been satisfied under the  
9 plan, so they're not part of the agreement any longer.

10 THE COURT: Okay. So is that "Schedule 1" that's  
11 referred to here?

12 MS. GOLDSTEIN: Yes, that's the Schedule 1.

13 THE COURT: Okay. All right.

14 MR. PERRAULT: Yes, Your Honor. Just to confirm.  
15 Edward Perrault, Bingham McCutchen. We are still  
16 representing the Noteholders. What Ms. Goldstein indicated  
17 is correct. We have a settlement with the conditional  
18 claimholders. All of the conditional claimholders are  
19 finalizing their settlement agreements. We don't expect any  
20 issues with those settlements, we expect them to be  
21 implemented soon, the distribution of shares, within the next  
22 couple of months.

23 We are still representing the Article 2363  
24 claimholders, the sole shareholders. At this point, our  
25 clients are still pursuing those claims in Italy. We're

1 facing some strenuous objections that have been challenging,  
2 to say the least, but we are pursuing those in Italy.

3 And as Ms. Goldstein indicated, to the extent there  
4 are issues, we would like to reserve rights to come back to  
5 your court jointly. And I think that the order contemplates  
6 that.

7 MS. GOLDSTEIN: Yeah. And, Your Honor, I just want  
8 to make sure that we're in agreement that it's issues with  
9 respect to the conditional claims settlement that the 2362  
10 litigations is just proceeding in Italy.

11 MR. PERRAULT: It is proceeding in Italy --

12 THE COURT: All right.

13 MR. PERRAULT: -- but of course, we'd like to  
14 reserve our rights, as contemplated by the order, in case  
15 circumstances change egregiously; on an equitable basis, we  
16 would like to be able to come back. I think that's  
17 contemplated by Paragraph 9 of your proposed permanent  
18 injunction order. And our hope, Your Honor, is that we do  
19 not have to come back.

20 THE COURT: Okay. All right.

21 MS. GOLDSTEIN: Your Honor, we have no issue with  
22 Paragraph 9.

23 THE COURT: All right. I understand. So you're not  
24 pressing the objection today.

25 MR. PERRAULT: No, not at all.

1 THE COURT: Okay. And the PBGC, I saw their counsel  
2 earlier. I guess the colloquy on the record about how the  
3 PBGC's rights were not being affected by this injunction  
4 resolved the PBGC's objection?

5 MS. GOLDSTEIN: Well, Your Honor, we -- I assume we  
6 should hear from the PBGC. But we do not agree with the  
7 language that they have proposed --

8 THE COURT: No, I understand.

9 MS. GOLDSTEIN: Yeah. Okay.

10 THE COURT: I understand that. But again, as I  
11 understood it, the PBGC was concerned that this injunction  
12 would preclude it from asserting a control group claim if in  
13 fact there was -- which is now contingent -- if in fact there  
14 was a deficiency in the U.S.A. debtors' pension plan. Is  
15 that right?

16 MR. MURRELL: Well, Your Honor, we actually are more  
17 concerned, Your Honor, with the fact that there are these  
18 releases that are being given out to everybody willy-nilly  
19 against the pension plan.

20 THE COURT: But see, that's why we went through this  
21 colloquy on the record about the scope of the injunction. As  
22 I understood it, the non-debtor entities, the non-foreign-  
23 debtor entities, claims against them are not being enjoined  
24 if they are independent or direct; so that, for example, if  
25 some Brazilian subsidiary had control group liability under

1 U.S. pension law, and it was a non-debtor entity, this  
2 injunction would not enjoin the PBGC from pursuing a claim  
3 against that Brazilian subsidiary for the under-funding of  
4 the pension plan if it ended up being under-funded.

5 It would enjoin the pursuit here in the U.S. of any  
6 of the foreign debtors in respect of their potential control  
7 group liability; in essence, it would provide that the PBGC,  
8 like every other creditor of the foreign debtors, would have  
9 to pursue its rights through the foreign composition.

10 MR. MURRELL: Yes, Your Honor. I guess that's where  
11 the PBGC sort of has a big issue, in that the -- it's not so  
12 much really even the control group members, Your Honor, but  
13 more that the release is being given to non-debtors here, as  
14 well.

15 You know, as we point out in our brief, Your Honor,  
16 the professionals and everyone else, it's sort of identical  
17 language, Your Honor, as to what happens to the releases that  
18 were given in the bankruptcy of Parmalat Finanziaria's former  
19 U.S. subsidiaries and --

20 THE COURT: But I don't -- you have to point to --  
21 what releases?

22 MR. MURRELL: Well, Your Honor, we think that the  
23 language that's used in -- you know, that's used in the  
24 order, you know -- for example, Your Honor, as we point out -  
25 - as we point out in our brief, we think if you look at the -

1 - and I'm working off of the order that was -- that was filed  
2 at the time we filed our brief.

3 THE COURT: Right.

4 MR. MURRELL: But certainly, Your Honor, we think  
5 that -- you know, that some of the release language, if you  
6 look at Paragraph 3 and 9 of -- you know, of the proposed  
7 permanent, you know, injunction order, give, you know,  
8 releases to non-bankrupt -- you know, non-bankrupt entities,  
9 affiliates, different people, Your Honor.

10 And our concern is that, Your Honor, we have not --

11 THE COURT: I just don't -- but you're going to have  
12 to be more specific than that. I don't see any release in  
13 here. I do see an injunction of the composition debtors -- I  
14 mean protecting the composition debtors and the liquidating  
15 debtors, which are both subject to the Italian Court process;  
16 and thirdly, subsidiaries and affiliates. But we talked  
17 about the subsidiaries and affiliates, and I think you're --

18 MR. MURRELL: Well, Your Honor --

19 THE COURT: -- there's no injunction of your claims  
20 there, as far as the subsidiaries and affiliates are  
21 concerned.

22 MR. MURRELL: And about any professionals or any  
23 other persons, Your Honor --

24 THE COURT: Well, where does it say that?

25 MR. MURRELL: Well, this, Your Honor, we're just

1 concerned that the --

2 THE COURT: No, but you -- I don't -- you have to  
3 point me to the specific language that's concerning you.

4 MR. MURRELL: Your Honor, I apologize, Your Honor.  
5 It's been awhile since we filed.

6 THE COURT: Okay.

7 MR. MURRELL: We filed this back in August of 2006 -  
8 -

9 THE COURT: Well, I'll tell you what. Why don't I  
10 hear from Mr. Krakauer on the B of A/BankBoston parties'  
11 objections, and you can look for that language and then come  
12 back to it.

13 MR. MURRELL: Okay, Your Honor, and I'll --

14 THE COURT: Okay. That's fine.

15 MR. MURRELL: Okay.

16 MR. KRAKAUER: I'll move up here.

17 THE COURT: Okay.

18 MR. KRAKAUER: First, I want to thank you on the  
19 scope issues. I think we've gotten very, very far addressing  
20 the concerns that we had, so I think there's not a need for  
21 me to further address those, so I'll confine myself to the  
22 *data certa* issues, which were the first part of our brief.

23 And with -- and for both -- if you aggregate Bank of  
24 America and BankBoston, together these banks have in excess  
25 of \$266 million of claims which are presently in dispute, and

1 which were the subjects of this particular objection to this  
2 304 relief. And we believe that the manner in which the  
3 foreign debtors have used the Italian principle of *data certa*  
4 to seek disallowance of the banks' claim in the foreign  
5 proceedings just is fundamentally inconsistent with what 304  
6 requires, in terms of just treatment, that we not be subject  
7 to prejudice or inconvenience in the processing of the  
8 claims, and that distribution of proceeds to creditors be  
9 substantially in accordance with what Title 11 provides.

10 And this is -- this is not, I should say, a broad-  
11 based attack on *data certa*, saying that we're asking you to  
12 find that *data certa*, as a principle, is necessarily  
13 inconsistent with the Bankruptcy Code. We're looking to how  
14 it's been applied in this particular case, in these  
15 particular circumstances by Mr. Bondi and the courts in  
16 Italy.

17 And to give you just one graphic example -- and I'll  
18 get to some others -- the foreign debtors are presently  
19 asserting in the U.S. MDL proceeding before Judge Kaplan, as  
20 they themselves admit, that they are challenging the banks'  
21 loans to Parmalat and asserting that there was something  
22 untoward about those loans, and therefore they're entitled to  
23 large amounts of damages. At the very same time in Italy,  
24 the same foreign debtors are asserting that there's no proof  
25 that the very same loans were in fact made prior to the

1 filing of their extraordinary administration proceeding. And  
2 that's not a case of asserting alternative legal theories;  
3 it's a case of asserting in one forum affirmatively that Fact  
4 A exists, and then going across the Atlantic and saying to  
5 another court, we have no proof that Fact A exists, and we  
6 think you should disallow this claim under that --

7 THE COURT: But why should I get involved in that  
8 dispute? I mean, why don't you raise that issue with Judge  
9 Kaplan in terms of judicial estoppel, for example, or with  
10 the Italian Courts as saying that Mr. Bondi should be subject  
11 to an equivalent doctrine there? I mean, particularly since,  
12 as Ms. Goldstein says, this isn't really a bankruptcy law  
13 principle, per se, but a matter of general Italian civil law?

14 MR. KRAKAUER: Well, let me address the Italian  
15 question first, then I'll get to Judge Kaplan. I mean, the  
16 reason that you're required to look at it is because of what  
17 304(c) says, in terms of the requirements that the debtor has  
18 a burden of showing to come before it to get an injunction.  
19 They have to show that we were given just treatment, and they  
20 have to show that the processing of our claims is without  
21 prejudice.

22 And what Treco says is you got to do a searching  
23 analysis of what has actually transpired, and you have to  
24 reach a decision of, was it a fair process, are they  
25 proceeding in good faith or not. Because there are numerous



1 courts which have also held that good faith is an essential  
2 element of granting a 304 injunction.

3           So if they're doing things -- if they're handling a  
4 proceeding with respect to the processing of our claim in a  
5 way that is just fundamentally inconsistent with how we would  
6 be treated under U.S. law, then it does implicate 304. I  
7 mean, that's what the statute says. I mean, the real  
8 question is: What does this statute mean, and does it mean  
9 what it says? Because what it says is you don't grant a  
10 304(c) injunction unless the debtor satisfies these elements.

11           THE COURT: Well, but which elements are you  
12 referring to?

13           MR. KRAKAUER: I'm referring first to the just  
14 treatment of our claims; just treatment in Italy. And I'm  
15 also referring to lack of prejudice and distribution.

16           THE COURT: But as far as the just treatment is  
17 concerned, you have taken positions and are taking positions  
18 in the Italian Courts that you've won on and that you --  
19 things that you haven't won on, you hope to win on. I just -  
20 - what things are the Italian Courts doing that are not just?

21           MR. KRAKAUER: Well, no, I -- that's a fair  
22 question, and I think Treco addresses that, too. It's not  
23 just a question of whether the Italian Courts give us due  
24 process and procedures to make our arguments; it's also a  
25 question of whether the Italian substantive law as it may be

1 applied in the case accords us just treatment and isn't  
2 prejudicial to us.

3 What they are -- let me give you an example, just to  
4 show you what they're arguing.

5 We have, in the case of what's referred to as the  
6 "Cur transaction," the bank advanced more than \$90 million,  
7 and it was advanced through an entity called "Cur" and then  
8 on to the debtor. And that -- and it is not in dispute, they  
9 don't dispute, either here or in Italy, the fact that that  
10 advance was made. What they are asserting is that because  
11 the loan --

12 THE COURT: Well, I want to focus first on the  
13 Italian Courts. Has the Italian Court ruled on *data certa*  
14 with regard to the Cur transfer?

15 MR. KRAKAUER: In the case of the Cur situation, the  
16 Italian Court agreed with us in the first instance, in their  
17 equivalent of the bankruptcy court -- it's not called a  
18 "bankruptcy court" there, but the judge sitting in the first  
19 instance in the extraordinary administration. And then what  
20 happened next is Bondi, through his affiliate, appealed that  
21 --

22 THE COURT: Okay. But I want to focus first on the  
23 Italian Courts and applying the law.

24 MR. KRAKAUER: Okay.

25 THE COURT: I mean, it seemed to me that your

1 argument prevailed on the Cur transaction.

2 MR. KRAKAUER: It did prevail in the first instance,  
3 that's correct.

4 THE COURT: Okay. So you're just mad that he's  
5 appealed it.

6 (Laughter.)

7 MR. KRAKAUER: We're here because we have an Italian  
8 principle that's not the same as the U.S. principle.

9 THE COURT: It doesn't have to be the same.

10 MR. KRAKAUER: Well, no, but it's fundamentally  
11 different, and it does have to be fundamentally consistent.  
12 If it's contrary to --

13 THE COURT: Well, but wait. You're a litigator,  
14 right? I know you're a litigator. You're fully aware of  
15 what the hearsay rule is, for example, the best evidence  
16 rules, rules on admission of documents, et cetera.

17 MR. KRAKAUER: Right.

18 THE COURT: How drastically different is *data certa*  
19 from those rules, when you get down to it?

20 MR. KRAKAUER: Drastically. Drastically. Let me  
21 give you -- let me --

22 THE COURT: Well, when you read it, it says:

23 "From the data on which other circumstances occur,  
24 which establish with equal certainty that the  
25 writing was drawn up previously."

1           That doesn't sound much different from the  
2 exceptions to hearsay.

3           MR. KRAKAUER: Okay. Let me tell you how --

4           THE COURT: The general exception to hearsay.

5           MR. KRAKAUER: Let me tell you how -- what Bondi  
6 says. Okay?

7           THE COURT: No, no, I want to focus on --

8           MR. KRAKAUER: No, no. It --

9           THE COURT: -- how the Italian Courts apply this.

10          MR. KRAKAUER: In this --

11          THE COURT: Because I think -- I'll let you get to  
12 how the debtor is pursuing the objections, but I think the  
13 first thing for me to figure out is what, if anything, is  
14 wrong fundamentally, if there is something wrong  
15 fundamentally, with either how the Italian Courts are dealing  
16 with these issues or the statute itself.

17          MR. KRAKAUER: Okay. I'll do the best I can, Your  
18 Honor. I'm not an Italian lawyer, and it is much easier for  
19 me to focus on what I am familiar with, which is what I've --  
20 what the parties in the case have asserted is the law,  
21 because --

22          THE COURT: Well, that -- but that's -- you know,  
23 short of Rule 11, people can have very great arguments about  
24 what the law is.

25          MR. KRAKAUER: Well, but that's -- but the law --

1 that's what we're dealing with here, because what we're  
2 dealing with is a situation where Mr. Bondi, who's a public  
3 official -- I mean, he's not -- in this case, he is appointed  
4 by the government, he is asserting -- he's running --

5 THE COURT: The U.S. Trustee appoints American  
6 trustees.

7 MR. KRAKAUER: In a Chapter 7. That's correct.

8 THE COURT: And in an 11, unless there's a -- you  
9 know, in consultation with the creditors.

10 MR. KRAKAUER: Okay. The reporting, as I understand  
11 it, is a little bit different, in that he continues to report  
12 to the various -- to the ministry of productive activities  
13 through the case --

14 THE COURT: Okay.

15 MR. KRAKAUER: -- and has approval for what he does.  
16 So it really functions much more as an administrative  
17 function, my understanding is. But here, let me go from what  
18 I understand is happening here.

19 First, all witness, live witness testimony is being  
20 excluded. Okay?

21 Second, any bank records that are not notarized are  
22 being attempted to be kept out.

23 THE COURT: Attempted.

24 MR. KRAKAUER: Well, so -- you know, I can just tell  
25 you where this is going.

1 THE COURT: No, I'm trying to --

2 MR. KRAKAUER: Right.

3 THE COURT: Again, there's a distinction between  
4 what litigants -- what position litigants take and what the  
5 courts are doing. I think that's very important to me. I'll  
6 give you an example --

7 MR. KRAKAUER: Yeah.

8 THE COURT: -- because you want to get to Dr.  
9 Bondi's conduct -- from my own experience as a lawyer.

10 We represented a debtor, United States Lines.  
11 Prudential Insurance Company had a preferred mortgage on many  
12 U.S. Lines vessels for \$128 million. They lent the money.  
13 It was clearly intended that it be secured by these vessels.  
14 They restated the mortgage. In every mortgage there was a  
15 typo, and instead of saying \$98 million, it was \$98,000. As  
16 a debtor, given the position of Prudential in the case, we  
17 brought an action to avoid the mortgage. Secured finance  
18 lawyers all over the country were screaming, this is an  
19 outrage. But that's what the Bankruptcy Code lets you do.

20 We never knew whether we would win or not because  
21 the matter was ultimately settled because there were  
22 different views, not only among lawyers, but I imagine even  
23 in Judge Buschman's head as to how it should turn out, so it  
24 was settled. So of course there can be different  
25 interpretations of a law that may have drastic effects, but

1 that's why I'm trying to focus on how it's actually being  
2 determined and applied, first.

3 MR. KRAKAUER: Okay. Well, let me give you some --  
4 an actuality. In the BankBoston situation, where the Court  
5 did rule against BankBoston on *data certa*, Bank was able to  
6 show its records that the loan was in fact made, had copies  
7 of all the loan documents. It had numerous correspondence  
8 between the parties showing that the loan and guarantees were  
9 made; okay, we attached some of that, that it was produced by  
10 the debtor itself from its own records, showing that they  
11 were acknowledging that the guarantees were executed. There  
12 were records of wire transfers to show that the loan was made  
13 and such. And all those were presented to the Court, and the  
14 Court, notwithstanding that, abided by --

15 THE COURT: Well, the ruling by the Parma Court only  
16 refers to documentation produced by the bank, letters, and e-  
17 mails; it doesn't say anything about wire transfers.

18 MR. KRAKAUER: My belief -- and I -- if you want,  
19 I'll check it. I believe the wire transfers were filed in  
20 the first instance, but I'll check that. I know they're of  
21 record.

22 THE COURT: Okay. Because again, I mean, this is --  
23 as Ms. Goldstein said, this was a -- it hasn't been  
24 determined who was involved in the fraud, but I think  
25 everyone will agree that there was some significant fraud

1 here. And so relying on the debtors' own records may not  
2 necessarily, in this instance, be that probative.

3 MR. KRAKAUER: Well, Your Honor, the one thing that  
4 they have not said in any of their pleadings in this court is  
5 they didn't come forward with an affidavit saying that they  
6 have a good-faith belief that these loans may not have been  
7 made or these guarantees were not executed. That's not what  
8 this is about.

9 THE COURT: No, but see that's --

10 MR. KRAKAUER: I mean --

11 THE COURT: I understand that.

12 MR. KRAKAUER: Yeah.

13 THE COURT: But there's another exhibit here,  
14 Exhibit 17 to your second affidavit --

15 MR. KRAKAUER: Yeah.

16 THE COURT: -- which is one where Bank of America  
17 won. And on the second page, the Italian Court seems to  
18 apply the type of logic that you started out with, which is:

19 "The guarantee granted by Parmalat S.p.A. has a  
20 certified date, as it has been expressly referred to  
21 both by the trustee in the summons relating to the  
22 action brought against Bank of America, and by  
23 Pricewaterhouse in its reports. Bank of America  
24 must, therefore, be admitted to the bankruptcy  
25 estate."



1           So, at least in that instance -- and you know,  
2 courts can be wrong sometimes. But this one, as far as  
3 you're concerned, they're right. So should I throw out an  
4 injunction request in an instance where a court accorded you  
5 this right and has applied what appears to me to be estoppel,  
6 when perhaps -- although it's not clear to me what was  
7 presented to the Court -- it was wrong, according to B of A,  
8 in another instance? I mean, it just seems to me that that's  
9 really -- I'm really being asked there to step -- almost act  
10 like an appellate court over this principle, an Italian  
11 appellate court.

12           MR. KRAKAUER: Okay. No, I understand. But let's  
13 follow that out. I mean, we're sitting here now, and one or  
14 two things would happen if you let it go forward, right? I  
15 mean, either the Court ultimately agrees with the banks'  
16 position, whatever it is, or it doesn't. And if it doesn't,  
17 that means that, notwithstanding the fact that these loans  
18 were made, and that tens and, really, in this case, hundreds  
19 of millions of dollars were advanced, we get treated in the  
20 Italian proceeding on this claim as if we never advanced a  
21 dime, and there's no -- because we couldn't prove -- quote,  
22 "prove" under Italian jurisprudence that those loans were  
23 made.

24           And to say that, okay, the Court may not come to  
25 that conclusion, I don't think saves them. Because the fact

1 is, is that it is just fundamentally -- our position is it's  
2 just fundamentally inconsistent with 304(c)'s standards for  
3 the Court to come to the position against us. And because  
4 that's what's going on, that Mr. Bondi is pursuing these  
5 claims, which are not good-faith claims, we're being  
6 subjected to that in the process.

7 And with respect to BankBoston, we're being denied  
8 the present right to any of the distributions. With respect  
9 to Bank of America, with respect to one of its claims, it's  
10 also being denied the right to a distribution; it's being  
11 prejudiced by that. And with respect to the other claim,  
12 it's holding onto its shares to see what happens with that,  
13 basically holding them in reserve.

14 But this is not something that can be addressed. We  
15 don't have the ability to come back before this Court three  
16 years from now or four years from now, whenever it gets  
17 decided, if it's decided adverse to us. This is it. I mean,  
18 this is the 304 --

19 THE COURT: Well, no. You do have another option,  
20 don't you, besides rolling the dice and litigating all the  
21 way through to conclusion, and either winning a hundred  
22 percent or losing a hundred percent? Isn't it reasonably  
23 clear to both sides, given the rulings on both sides of this  
24 issue -- particularly the one I just quoted, which seems to  
25 take the line right out of what you began with here, which is

1 they are asserting the exact opposite position in front of  
2 Judge Kaplan --

3 MR. KRAKAUER: Right.

4 THE COURT: -- that both sides know that they could  
5 lose? And when both sides know they could lose, they can  
6 factor that into all of their other calculations and settle.  
7 And isn't that what the law is all about?

8 MR. KRAKAUER: Your Honor, when this case -- when  
9 this particular 304 proceeding started with our first  
10 objection, one of the things that came up was the debtor was  
11 saying we're trying to settle this. And so you said, well,  
12 I'll take settlement issues -- the settlement issues, I'll  
13 make an exception, we'll hear that at the final hearing.  
14 Okay. So we're at the final hearing.

15 On the BankBoston side -- let's not get into Bank of  
16 America, let's just -- obviously, that's a much more  
17 complicated situation for all parties. With reference to  
18 BankBoston, they represented they were going to make a good-  
19 faith effort to settle this thing. We made a proposal.

20 THE COURT: Well, I'm not saying they have to accept  
21 it.

22 MR. KRAKAUER: Well --

23 THE COURT: But I mean, all I'm saying is that  
24 there's a mechanism out there for parties to resolve their  
25 differences.

1 MR. KRAKAUER: It hasn't move one iota in this time;  
2 that we never got a counter-proposal, they haven't -- they  
3 made clear in the deposition, Mr. Chiara (phonetic) did, that  
4 they had no intent of giving us one on the BankBoston side.  
5 And it has not gone anywhere, other than it continues to be  
6 litigated, period. So there -- it shows no prospect of  
7 settlement. You asked the parties to make an effort to do  
8 that; we did, and they have expressed no interest.

9 THE COURT: Well, it just -- it seems -- it  
10 certainly seems counter-intuitive to me that where there are  
11 contradictory rulings on an issue, the parties wouldn't  
12 consider a settlement at some point and, of course,  
13 BankBoston has the recapture issue, so maybe the point isn't  
14 now, but later, when that issue becomes more ripe, just like  
15 the B of A becomes more ripe. I don't know where you are in  
16 terms of that litigation in front of Judge Kaplan, but it's  
17 easier to settle something when you only have one issue.

18 My point was, it is really -- given the different  
19 types of rulings that have been attached and the face of the  
20 statute, can you really say that it's being applied in a way  
21 that is fundamentally repugnant to U.S. notions?

22 MR. KRAKAUER: Your Honor, I come back to the point  
23 of it is fundamentally repugnant to U.S. law and U.S.  
24 procedures for our loan claims to be disallowed on the basis  
25 that we haven't been able to prove up that that alone, in

1 fact, exists, when they, in fact, can't dispute, in good  
2 faith, that that's, in fact, the case.

3 I mean, that's what's repugnant. And I submit that  
4 it doesn't make any sense to say because we don't have a  
5 final ruling on that case in Italy, we should just not  
6 address it now, because if that's the result it is, it is  
7 repugnant and that's what this particular debtor is asserting  
8 that the results should be, and that's just -- that's not  
9 just treatment. I mean, that's what the statute requires.  
10 It's their burden.

11 THE COURT: But let me -- I mean, we talked briefly  
12 about Treco. If it's about anything, it's about protecting  
13 collateral, security interests. The Second Circuit  
14 recognizes that security interests, at least ones like the  
15 one in Treco, deserve some special attention. And yet, a  
16 Chapter 7 trustee and a Chapter 11 trustee can void a  
17 security interest if you don't do the filing. There's no  
18 equitable exception. It's gone.

19 MR. KRAKAUER: And if it's a question -- there are  
20 certainly lots of cases which -- and lots of analogies in  
21 U.S. law where you talk about whether or not a party should  
22 be entitled to a priority over another party, or a lien  
23 interest, when other parties don't have a lien interest, and  
24 what you have to do in order to give yourself either a  
25 priority or a lien interest -- those cases, there's a ton of

1    them, and all sorts of different circumstances.

2               What there isn't, in U.S. law, is a circumstance  
3    that anything like this, where one party loans money and the  
4    Court says, "we're not going to even give you a claim --"

5               THE COURT: Well, it's a guaranty, you remember.  
6    It's not a loan. It's a guaranty. It's a third party  
7    putting up its credit separately.

8               MR. KRAKAUER: Well, but it's the same -- it's the  
9    same --

10              THE COURT: Just like the debtor would put up its  
11   collateral to provide extra credit support.

12              MR. KRAKAUER: Well, but all in the same  
13   transaction. These advances were all done in connection with  
14   the guaranties.

15              THE COURT: What do secured creditors get under the  
16   composition? What percentage?

17              MR. KRAKAUER: There was -- you'd have to ask Ms.  
18   Goldstein. I don't recall anything with regard to secured  
19   creditors, other than many get their collateral, but that may  
20   be incorrect. I have not focused on that.

21              THE COURT: Do you know, Ms. Goldstein?

22              MS. GOLDSTEIN: Your Honor, yes. The secured  
23   creditors basically receive the value of their collateral.  
24   It's not --

25              THE COURT: Whatever that is?

1 MS. GOLDSTEIN: Whatever that is. And I did want to  
2 -- you brought it up before I could, that the fact that the  
3 loan was made isn't relevant to the enforceability of the  
4 guaranty, and I just wanted to make clear the distinction  
5 between saying a loan was made -- all of the claims we're  
6 talking about here were the guaranties.

7 THE COURT: Guaranty claims get six percent?

8 MS. GOLDSTEIN: Against Parmalat S.p.A., yes.  
9 They're treated as an independent claim at the Parmalat  
10 S.p.A. level, and not all of the claims of Bank of America  
11 that were rejected were rejected on the grounds of *data*  
12 *certa*.

13 THE COURT: Right. But you can certainly see a  
14 situation where being deprived of a lien would deprive you of  
15 more value than being deprived of six percent under this  
16 composition.

17 MR. KRAKAUER: Well, the law is not always  
18 economics. I mean, you could always say that if you take  
19 away ninety-four percent of somebody's money, it's not as --  
20 I mean, it's --

21 THE COURT: No, I'm just trying to see, you know,  
22 whether it's -- first of all, Ms. Goldstein made the  
23 argument, which I think is fairly telling, that (c)(4)  
24 doesn't really apply here because that refers to  
25 "substantially in accordance with the order prescribed by

1 this title," and this is a civil -- it's not a bankruptcy law  
2 provision. So I'm sort of applying general notions of comity  
3 to this point.

4 MR. KRAKAUER: Can I address that, though? Okay,  
5 because I think it basically is a bankruptcy. My  
6 understanding is that is basically a bankruptcy provision.  
7 What it is is tantamount to a hypothetical third-party-  
8 creditor statute, so it basically says, for *data certa*, that  
9 if you have a third party, it can make *data certa* arguments.  
10 Much like in this country, obviously, if you have judgment,  
11 meaning creditors in a hypothetical --

12 THE COURT: All right. But now -- I mean, this  
13 isn't on a usual -- it's one of those unusual situations  
14 where you're each kind of making the opposite point from what  
15 you make in litigation, because as I understand it in the  
16 litigation, you're saying that it's not a bankruptcy  
17 provision, but it's available to third parties in other  
18 contexts, right?

19 MR. KRAKAUER: Well, there was a question --

20 THE COURT: And I don't mean you. I mean the  
21 Italian counsel.

22 MR. KRAKAUER: No, I understand. There's a question  
23 -- the Italian bankruptcy proceeding, with respect to  
24 Parmalat is -- was -- is sort of *sui generis*, that it was  
25 done under what's known as the Marzano Law, which was a



1 special provision that was enacted, essentially for this  
2 case. So the issue, as I understand it, that was raised in  
3 the proceeding was not -- was whether or not, under this type  
4 of *sui generis* proceeding, the *data certa* principle would  
5 apply. So it was much more narrow than Ms. Goldstein said.

6 THE COURT: Okay. All right.

7 MR. KRAKAUER: So that was the issue.

8 THE COURT: Okay.

9 MR. KRAKAUER: Okay? But I -- let me come back to  
10 the fundamental point. I mean, there are a number of cases  
11 in this Circuit, Multicanal is one, and there's at least one  
12 or two others, where they talk about one of the things that  
13 has to be tested under 304(c) is the conduct of the trustee  
14 or the debtor that's actually running the proceeding, and  
15 whether or not that conduct is complying with Section 304(c).

16 So it is not just the question of criticizing, you  
17 know, what the Court is doing or -- it's also a question of  
18 analyzing their proceedings actually run, and that's right  
19 here before us. I mean, there is nothing -- what is being  
20 done by the foreign debtors in this particular instance is --  
21 would simply not be allowed under U.S. law. The kinds of  
22 assertions they're making and asserting one thing in one  
23 place and making assertions that they've now admitted, for  
24 instance, in their deposition, don't have a legal basis,  
25 would be grounds in the United States for sanctions. And for

1 them to -- for this Court, in that circumstance, to give 304  
2 relief is just -- it's just not what 304(c) says.

3 Let me give you a perfect example of that. For Bank  
4 of America, when I took the deposition of Mr. Chiara, one of  
5 the questions we asked about was his other settlements, and  
6 he talked about the Arab Bank settlement. I said:

7 "Well, on what basis did you approve and go forward  
8 with the Arab Bank settlement?"

9 And he said, well, Arab Bank came up with a Centrale  
10 Rischì, which is a database that's kept by -- that banks use  
11 in Italy, and they submit information on loans into --  
12 Centrale Rischì just means central risk. It's run by the  
13 Bank of Italy, and they -- he said they made a filing of  
14 their loan with that database, and we determined, and we  
15 quote this in our brief, we determined Parmalat, that that  
16 legally satisfied *data certa*. Well, it turns out we made the  
17 same filings. We attached an affidavit of Mr. Ribaldi  
18 (phonetic) with those exact filings.

19 So you have an instance where they said --

20 THE COURT: Has the Italian Court ruled on that yet?

21 MR. KRAKAUER: The Italian Court has not ruled on  
22 it, but in terms of what would be done under U.S. law, which  
23 is what we look to in terms of consistency, you ask yourself  
24 first the question, is it appropriate where somebody has --  
25 knows that a position is not legally correct --

1           THE COURT: But if that's before the Italian Court,  
2 why should I step in on that? Why should I assume that the  
3 Italian Court is going to do something when it hasn't ruled  
4 yet?

5           MR. KRAKAUER: Yeah, in the two -- well, I have two  
6 answers to that, but let me at least tell you factually where  
7 it is, and there's two different Bank of America credits. In  
8 one case, that filing was made -- excuse me -- the evidence  
9 was put into court, so it is before the Court. In the other  
10 circumstance, by the time that the deposition was taken, et  
11 cetera, it was too late, I'm told, to supplement the evidence  
12 in Italy, and they don't have as flexible rules on  
13 supplementation as they might here in the United States.

14           So in one case, it's before a Court. In the other  
15 case, Mr. Bondi hid his legal conclusion under after the  
16 evidence was already presented.

17           But here in the United States, it would end it. You  
18 would sanction somebody for continuing to proceed on that  
19 basis, under Rule 11, if they admit that they don't have a  
20 legal basis to make a contention. And how -- isn't that one  
21 of the more fundamental principles of U.S. law?

22           THE COURT: Well, there's no such similar principle  
23 under Italian law?

24           MR. KRAKAUER: There's not one that I'm aware of,  
25 Your Honor.

1 THE COURT: But that's a different -- that's under -  
2 -

3 MR. KRAKAUER: That's not one that I'm aware of. If  
4 we thought --

5 THE COURT: But you're not aware there isn't one,  
6 either.

7 MR. KRAKAUER: Well, I would say this. I mean, if,  
8 on our side, if we knew that this was going to end it in a  
9 very straightforward way in Italy, and that it was all going  
10 to be over, there would be no reason for me to be here.

11 THE COURT: Well, I'm not sure I agree with that,  
12 frankly. I'm not unaware of the far more high-stakes  
13 litigation that's going on in the District Court, and the  
14 leverage that B of A might have in messing up this  
15 injunction. And I'm also not unaware of the fact that there  
16 was a lengthy period where, unlike BankArab and the  
17 noteholders, there doesn't appear to have been the type of  
18 exchange of information between the Italian counsel  
19 representing B of A and Dr. Bondi, than as there was with  
20 BankArab and the noteholders.

21 I mean, there was a -- one of the reasons this was  
22 delayed so long, this hearing, was to -- at my insistence, to  
23 try to facilitate a non-judicial resolution of this *data*  
24 *certa* issue. Now, I know in your pleadings you say that you  
25 were given the cold shoulder on that and the debtors

1 disagree, but it's really unclear to me who is to blame  
2 there. I mean, was there ever -- there's nothing in  
3 evidence, from B of A's side or BankBoston's side, such as a  
4 letter to the debtor saying, we can support our *data certa*  
5 argument with the following, including the Centrale Rischi,  
6 or however -- excuse my pronunciation.

7 I don't see that in the record. I do see a letter  
8 saying you tell us what you need, and then there was a  
9 request for depositions, but, you know, it's one thing to  
10 settle something before it gets into litigation, particularly  
11 when you're a trustee in a fraud case. It's another thing to  
12 settle it after there's been litigation when you're a trustee  
13 in a fraud case and you're settling with one of the main  
14 targets of your fraud case. So it's hard for me to really  
15 balance who's entirely to blame here.

16 MR. KRAKAUER: Can I address this point, Your Honor?

17 First, on the injunction point, I just want to be  
18 absolutely clear. We said this in our pleadings and in terms  
19 of the relief we're setting here, we're not here trying to  
20 up-end the plan or do anything like that. What we've asked  
21 for is very discrete relief.

22 THE COURT: That's fair. That is fair.

23 MR. KRAKAUER: And that they could easily grant, and  
24 is not going to harm their plan, so I just want to be clear.  
25 We've never come in here and said what you ought to do, and I

1 was here where some other people were saying that at the last  
2 hearing. That's not what we're attempting to do. If we got  
3 our relief on *data certa*, we're done with this point, okay?

4 In terms of the settlement, I could tell you, based  
5 on my personal experience, one is we did ask them -- we've  
6 given them a ton of information. There's been a ton of  
7 information, frankly, filed of record in Italy. I mean, you  
8 can go --

9 THE COURT: But when?

10 MR. KRAKAUER: Well, it was done all throughout this  
11 thing. There have been filings -- loads of filings going --  
12 and --

13 THE COURT: But in a litigation context, or in a --  
14 I mean, there's really very little here on the record that  
15 goes to that issue.

16 MR. KRAKAUER: But -- I'm sorry. I didn't mean to  
17 interrupt.

18 THE COURT: No. I mean, again, I just reiterate  
19 that it's easier to settle, when you're a trustee, before  
20 things get into court, sometimes, particularly on something  
21 like this, it would seem to me.

22 MR. KRAKAUER: Well, all I could say is, from our  
23 standpoint, we gave them a ton of things and we asked them,  
24 okay, we've given you all this. I think it proves, without  
25 question, that these loans were made and that we've satisfied

1 all your concerns.

2 THE COURT: Well, but again, it's not really that  
3 the loans were made. It's that the guaranty was obtained by  
4 a certain date.

5 MR. KRAKAUER: Well, I know. But on that point,  
6 too, I mean, we gave --

7 THE COURT: Okay.

8 MR. KRAKAUER: -- a ton of documentation and we  
9 never got anything back. What we got back, simply, was what  
10 you haven't given us as sufficient, and they never asked for  
11 anything other than loans.

12 But let me -- they never said, give us A or B if you  
13 have it, other than a notarization.

14 THE COURT: Well --

15 MR. KRAKAUER: Can I make one point, because I want  
16 to be very clear on something, for Bank of America, because I  
17 think there is a misunderstanding. For the Bank of America,  
18 two guaranties. There was notarization on the actual  
19 guaranties that were issued, so that's not what the *data*  
20 *certa* is in respect --

21 THE COURT: But no -- but again, on those two  
22 guaranties, you won, right? I mean, it's on appeal now by  
23 Dr. Bondi, as you know.

24 MR. KRAKAUER: We won one on Cur, and we didn't win  
25 the one on the Bank of America loan, Brazil loan. That was

1 ruled against -- that was ruled against us. It was not ruled  
2 against us on *data certa* grounds.

3 THE COURT: Yeah. It was on duplicate claims,  
4 right?

5 MR. KRAKAUER: It was on, basically, a duplicate  
6 claim. That's correct.

7 THE COURT: So that's --

8 MR. KRAKAUER: And then they --

9 THE COURT: So that's clearly not foreign to U.S.  
10 law. I do that every day.

11 MR. KRAKAUER: Well, it should have been resolved  
12 out simply, but then on appeal, Mr. Bondi has pursued these  
13 *data certa* claims, as well. But the point I was making is,  
14 it's not -- on these guaranties, these were guaranties. What  
15 Bondi is asserting is that even though the original loan and  
16 the guaranties comply with *data certa*, they were transferred  
17 along the way. In one case, they were transferred from this  
18 Cur entity over to Bank of America. In another case, they  
19 were transferred by Bank of America to under syndicate  
20 members, and then back to Bank of America.

21 And he's taking the position that because of those  
22 transfers, he doesn't owe anybody anything on those loans,  
23 that that destroyed the right of anybody to recover, even  
24 though the original loans complied with *data certa*. And, I  
25 mean, that's his position.



1           THE COURT: But it hasn't even -- but this hasn't  
2 even been -- that point hasn't even been litigated yet,  
3 right?

4           MR. KRAKAUER: Well, it's being litigated right now.

5           THE COURT: But I mean it hasn't so far. I mean,  
6 this is something that -- it wasn't a basis for the Italian  
7 Court to have ruled against you. They didn't -- they ruled  
8 in your -- against you on the one, based on duplicate claim,  
9 and they ruled in your favor on the other.

10          MR. KRAKAUER: Your Honor, I guess on that one you  
11 come to the point of whether you measure Mr. Bondi's conduct  
12 in determining whether 304(c) is satisfied. I would agree.

13          THE COURT: Okay.

14          MR. KRAKAUER: The Court has not addressed that  
15 issue. It's been briefed, it's been argued, but it has not  
16 been determined in Italy. I would agree with that.

17          THE COURT: Okay.

18          MR. KRAKAUER: So my contention is you've got to  
19 look at what Mr. Bondi's been doing.

20                 And on the other one, the BankBoston, we did have a  
21 ruling against us on that issue that we're now appealing, and  
22 they have a hundred-and-twenty-some-odd-million dollars of  
23 loans that they're not getting any distribution on, even  
24 though, you know, they have wire transfers, they have  
25 correspondence, they have all those different --

1 THE COURT: Well, the loans -- again, they're not  
2 getting distribution on the guaranty. They are on the loans.

3 MR. KRAKAUER: Well, the loans were -- well, they're  
4 not on the loans, either, actually. The loans were down in  
5 Brazil, and that entity went -- is also in a proceeding, and  
6 there's not been any recovery on it.

7 THE COURT: Okay.

8 MR. KRAKAUER: For the most part, that's where they  
9 are. So they haven't seen hardly anything on those loans.  
10 So this is their primary -- for most of those loans. Not a  
11 hundred percent, but for most of them, this is their primary  
12 source of recovery.

13 So can I get to what Mr. Bondi's -- so I can be  
14 clear, for the record, what he is actually asserting in  
15 Italy?

16 THE COURT: Yes.

17 MR. KRAKAUER: Okay. I mean, he is -- because I  
18 think it goes to all these points. I mean, he's basically  
19 saying that, all right, that you can't have any witness  
20 testimony. You can't use any bank records unless they're  
21 notarized. He's saying that the copies of the loan documents  
22 themselves, if they are not -- not to be considered if  
23 they're not notarized. He's saying we filed wire transfer  
24 records showing that the loans were made. He's saying that  
25 those should not be allowed. The correspondence, including

1 from the debtor's files, as well as from the bank's files,  
2 that indicate that the loans were done and the guaranties  
3 executed, he's also saying should not be considered.

4           They have reports from his own professionals who  
5 reviewed those business records. That's a PwC report that  
6 you referred to. He's saying that those ought not to be  
7 considered. He's also saying that even orders of the  
8 Brazilian Court, that found out that these loans were, in  
9 fact, made, because when you had a Brazilian proceeding or  
10 something, that ought not be considered.

11           I mean, basically, almost everything other than a  
12 notarization or a government record he is seeking to exclude,  
13 and he's saying if you don't have those, and the fact that  
14 you advanced all these monies, you don't get any recovery  
15 from me, and our position is that is just patently  
16 inconsistent with the U.S. process. There is no U.S. analogy  
17 to that, in connection with that. And --

18           THE COURT: So if you were representing a trustee on  
19 a lien avoidance action, you would agree to let the parties  
20 who are at the closing testify that they meant to perfect,  
21 but didn't, and that that should be meaningful?

22           MR. KRAKAUER: Perfection and priority issues, I  
23 think, are treated differently under U.S. law. They just  
24 are. And those -- clearly, I would have no argument that,  
25 dealing with the perfection issue, dealing with the

1 collateral rights issue, under those circumstances, that's  
2 what U.S. law provides. I mean, if you don't perfect, you  
3 don't get your collateral. If you don't do certain things to  
4 record, sometimes you lose your priority. But that's just  
5 not true of unsecured claims. That's just inconsistent.

6 THE COURT: But in terms of -- I guess the reason I  
7 asked it at that point was you were suggesting that he was  
8 proceeding in bad faith. I don't think you'd say that the  
9 lawyer who objected to having the people at the closing  
10 testify would be proceeding in bad faith by making that  
11 objection.

12 MR. KRAKAUER: I think the lawyer -- that somebody  
13 does proceed in bad faith, under U.S. law, where they know a  
14 fact is to be true, they assert the fact as not true, and  
15 they make contentions that they know just not to be grounded  
16 in fact. I mean, that's what Rule 11 is all about.

17 THE COURT: But again, it is true that the parties  
18 meant, in my hypothetical, to perfect. They just didn't. As  
19 a legal matter, they didn't do it. Is his position any  
20 different than that, other than the judicial estoppel point  
21 you made earlier, which I -- I understand that point.

22 MR. KRAKAUER: Well, I don't -- it's just not  
23 analogous. I mean, the fact -- there's no analogy, under  
24 U.S. law, where somebody is deprived of a claim, just a  
25 general, unsecured claim, by failure to go through a hoop.

1 THE COURT: No. Again, I'm going beyond the U.S.  
2 law versus Italian law point. I'm really talking about the  
3 good-faith point. I'm having a hard time seeing how he's  
4 proceeding in bad faith if he's asserting a reasonable  
5 interpretation of the statute. And then I guess, ultimately,  
6 I'm having a hard time seeing whether or why I should step in  
7 at this point if he's not, for some reason, given that it's  
8 all in front of the Italian Court and you can make the  
9 argument there that he's not acting in good faith.

10 MR. KRAKAUER: Well, Your Honor, I'm not sure that  
11 that argument is available to us in Italy.

12 THE COURT: But again, it's rare that there isn't  
13 some sort of equivalent, particularly where someone's at a --  
14 in a fiduciary position, under the control of, in this case,  
15 a ministry, but appearing in front of a court, that they --  
16 and his counsel is certainly appearing in front of the court  
17 -- that you don't have some regulations about conduct.

18 MR. KRAKAUER: Well, but he's not --

19 THE COURT: They may not have Rule 11, but there's -  
20 -

21 MR. KRAKAUER: But he's not going to court and  
22 saying -- in Italy and saying, I acknowledge these loans were  
23 made and I acknowledge these guaranties were signed, but  
24 because of this particular element, then this person doesn't  
25 have a good claim, and the element missing is the lack of

1 notarization. He's not saying that. He's basically saying  
2 there's no proof that the loan was -- that these documents  
3 were actually executed. That's what he's saying. He's not  
4 raising the narrow legal point that you hypothesized of  
5 because somebody didn't perfect. Now --

6 THE COURT: Well, where is that in the record? I  
7 don't necessarily see that in the record. I mean, the key  
8 phrase here, and it's an English translation, so it may have  
9 a different gloss in Italian, but the key phrase is  
10 "establish with equal certainty that the writing was drawn up  
11 previously." So it's more than just establish. It's  
12 establish with equal certainty. So that calls in all sorts  
13 of -- an extra layer of proof than just sort of simple proof.

14 The Italian legislature made a decision, you know,  
15 sixty-five years ago that -- for these types of obligations,  
16 where they're being asserted against third parties, you need  
17 extra proof.

18 MR. KRAKAUER: Well, and Mr. Bondi has discretion  
19 about how -- about circumstances under which he should or  
20 should not go forward with that. Again, I'm not -- I'm not -  
21 -

22 THE COURT: I just -- I'm having a hard time seeing  
23 why his exercise of that discretion in this case is the  
24 equivalent of the substantial maladministration that occurred  
25 in the Treco case. They just seem to be so far apart from

1 each other.

2 MR. KRAKAUER: We're being deprived of the ability  
3 to share pro rata, which is one of the --

4 THE COURT: But he's exercising his discretion. He  
5 has discretion to do that, right?

6 MR. KRAKAUER: But he's exercising it in a way where  
7 he's taking a position that he knows is not true.

8 THE COURT: But that seems to be begging the  
9 question, not true under the statute, or not true on some  
10 sort of general metaphysical sense?

11 MR. KRAKAUER: Well, not true as a factual matter.  
12 It's not general metaphysical.

13 THE COURT: No. I'm saying "not true under the  
14 statute?" Again, as a factual matter, people may think that  
15 they intended to perfect the lien, and as between the debtor  
16 and them, it is perfected, but as between third parties and  
17 them, it's not.

18 MR. KRAKAUER: But there's an underlying factual  
19 predicate. That's the difference. I mean, a knowing factual  
20 predicate is, was this guaranty and loan documentation  
21 executed or not prior to the filing? And my point is that  
22 there's not a good-faith dispute as the underlying factual  
23 predicate, and you need that. And that's what I'm saying, is  
24 it doesn't constitute just treatment, and that's why we're  
25 being prejudiced, because he's proceeding without a good-

1 faith belief in that factual predicate.

2 And that's why it's also not a broad-based attack on  
3 *data certa*. There may well be situations where a trustee is  
4 sitting there, unsure whether or not something is actually --  
5 was actually done, and for *data certa* to be applied in that  
6 circumstance is in a completely different situation. But  
7 here, that's not our case. I mean, he doesn't have that  
8 factual belief and it just -- we know that because of what  
9 he's filed here in the United States, and there's numerous  
10 other examples. It just -- how can he proceed and argue  
11 something factually he knows is not the case?

12 THE COURT: Okay.

13 MR. KRAKAUER: Thank you, Your Honor.

14 THE COURT: Yes?

15 MR. GINSBURG: Larry Ginsburg, Moses & Singer, for  
16 ABN AMRO Bank. We're a relatively small player here, but a  
17 purer player. We have no other gripes with Parmalat. We are  
18 not litigation adversaries.

19 ABN AMRO made a loan in New York for \$10 million.  
20 It was guaranteed by Parmalat. The document is a simple,  
21 one-page document, virtually identical to other ones, as the  
22 Court has seen in these proceedings, most recently the one in  
23 favor of Israel Discount Bank.

24 That guaranty provided, in very clear tones, that it  
25 was to be governed by the laws of New York, and that the



1 enforcement of disputes under the guaranty were to be held in  
2 New York.

3           There is no question -- I don't want to tread over  
4 old ground here, but the guaranty itself was signed by the  
5 executive of Parmalat. That signature was witnessed by a  
6 separate Italian bank in Italy. The document was received at  
7 ABN AMRO. It was pressed into the computer system, with the  
8 control system, with federal regulatory supervision.

9           The claim was asserted. All of the proof was  
10 provided, both formally and informally, to Parmalat's  
11 representatives. The claim was denied. Your Honor raised  
12 the question as to --

13           THE COURT: Well, they say that you didn't submit  
14 the Centrale Rischi database.

15           MR. GINSBURG: That may well be the case. This is a  
16 loan made in New York, to be governed by New York law.

17           THE COURT: But doesn't -- hasn't the Second Circuit  
18 been clear for decades that that doesn't matter in a  
19 bankruptcy case -- that choice of law, choice of forum  
20 provisions don't prevent us from granting comity to a foreign  
21 court in its claims procedures?

22           MR. GINSBURG: Yes, but we think, when it comes to  
23 an interpretation of a document, the law that the parties  
24 agree to should be the law that governs that interpretation.  
25 And the difference between Your Honor's suggestion before,

1 the UCC question, that both sides intended for security to be  
2 valid, but that there was avoidance possibility, that  
3 avoidance possibility was set forth in a law that both  
4 parties would have had knowledge of and it would have been  
5 reasonable for those parties to consider that law. Here, you  
6 have an interpretation of contract, a document signed, to be  
7 governed by New York law.

8 THE COURT: No, but the law that really hurts isn't  
9 the UCC. It's 544 of the Bankruptcy Code, because as between  
10 the debtor and the reputedly secured party, the debtor is  
11 going to be estopped. It's only where third parties become  
12 involved, and you get the good-faith status of a trustee that  
13 you're in trouble, so I'm not sure that goes that far.

14 MR. GINSBURG: Maybe not, but I still think it's  
15 fundamentally difficult for this Court to say to ABN AMRO  
16 Bank and to other banks that made loans in the United States,  
17 based upon documents that called for interpretation under New  
18 York law, with no other relationship with third-party  
19 witnesses, with computer-generated proof of dating, all of  
20 which has been rejected by the Court. The Court in Parma  
21 said that your own -- you may not hire an expert to prove  
22 that your computer-generated dating system was valid. You  
23 may not show --

24 THE COURT: I'm sorry. I thought your -- isn't your  
25 matter still being litigated?

1 MR. GINSBURG: It is being litigated, but the Court,  
2 as I understand it presently, has prevented the bank from  
3 proving certain things. It has prevented the bank from  
4 presenting witnesses from the third-party Italian bank that  
5 witnessed the signature. It has prevented the bank from  
6 presenting proof of its own internal computer-generated  
7 system, and it has prevented the bank from adducing proof  
8 from the debtors' records.

9 And yes, it is theoretically true that this action  
10 is still pending, but no one believes that it's going to come  
11 out any way but in favor of Dr. Bondi.

12 THE COURT: Okay.

13 MR. GINSBURG: So again, not to interfere with the  
14 statutory scheme, with the compromise, with what Counsel is  
15 trying to accomplish in America, we don't see why this Court  
16 can't fairly deal with a statutory scheme while prohibiting  
17 what is a fundamental, unfair and repugnant result, which is  
18 a guaranty signed, dated on its face, independently verified,  
19 and subject to independent verification, where the Court,  
20 imposing a law, fails to give the type of credibility that  
21 any U.S. Court would give. We don't see why that can't be  
22 excluded from the injunction, and why the injunction can't be  
23 conditioned upon the disallowance of the *data certa* defense  
24 as against ABN and other banks similarly situated.

25 I understand that last time we were here, IDB raised

1 a similar claim, and to some extent ABN adopted its legal  
2 arguments. IDB is not here arguing today. My assumption is  
3 that IDB has made a settlement with Dr. Bondi. When I asked  
4 our Italian counsel to obtain copies of that, they said such  
5 things are not filed and are not public.

6 So when the Parmalat situation arose, my  
7 understanding is that there were numerous banks in New York  
8 similarly situated, which basically loaned against identical  
9 instruments. I can't tell you why ABN is the only bank here  
10 today. I find it quite mystifying, but the documents are  
11 identical. My guess is the proof is identical, and whether  
12 it's the bad faith of Dr. Bondi or the lack of due process in  
13 the court or both, the unmistakable fact is that a U.S.  
14 creditor, ABN AMRO Bank, is not being treated fairly, is  
15 being treated differently than it would in any court in the  
16 United States if it brought in such a note and guaranty.  
17 Thank you, Your Honor.

18 THE COURT: Okay.

19 MS. GOLDSTEIN: Your Honor, I don't know if there is  
20 anyone else here to object, but I'd like to make a few  
21 remarks in response.

22 THE COURT: Okay.

23 MS. GOLDSTEIN: ABN -- I'll start with them -- AMRO  
24 Bank, N.V., I didn't presume to be a U.S. creditor. They  
25 obviously operate internationally. Maybe this loan was made

1 from their New York office, and the document said it was  
2 governed by New York law, but the fact is, this is a bank  
3 that operates all over the world, I have no doubt, makes many  
4 loans in Italy. This provision of Italian law is not unknown  
5 in commercial transactions, and Dr. Bondi, in the case of ABN  
6 or in the case of B of A, is not taking positions that Dr.  
7 Bondi knows to be false. Dr. Bondi is taking positions  
8 consistent with a statute that has to do with the steps  
9 required to assure enforceability of a claim against a third  
10 party.

11           Neither -- without the notarization, Dr. Bondi is in  
12 a position where he is obligated to challenge. In the case  
13 of Arab Banking, there was a -- I can't pronounce it either,  
14 central bank, you know, independent verification that was  
15 provided, and Dr. Bondi didn't rule. He determined that it  
16 made sense to make that settlement with Arab Banking. Israel  
17 Discount Bank submitted various documents in Italy, all these  
18 documents are in Italian, and a settlement was reached.

19           Your Honor, I don't think that --

20           THE COURT: Has ABN provided Dr. Bondi with the same  
21 types of documents?

22           MS. GOLDSTEIN: ABN has provided documents. Not the  
23 same documents, Your Honor. Every situation is quite  
24 different, but, Your Honor, there are many, many pending  
25 objections based on *data certa* and other things that are

1 currently pending before the bank -- before the Parma Court,  
2 not just ABN AMRO. It's not as though they are the only  
3 lender out there that has a claim subject to objection, and  
4 their claim has not yet been resolved. There is a process in  
5 Italy. Their counsel comments on -- you know, and I can't  
6 comment because I'm not privy to what the Court ruled in  
7 terms of admission or non-admission of evidence, but I think  
8 that this is a -- it is similar to a perfection statute in  
9 that in order to assure enforceability of a guaranty or a  
10 claim against a third party.

11           So the guaranties here, if Parmalat hadn't gone into  
12 Italian insolvency proceedings, would have been enforceable  
13 against Parmalat. But now we have the equivalent of a  
14 trustee acting under 544. And so you would have had to  
15 comply. And we know, from the record in this case, that  
16 various Italian counsel know about this and advise their  
17 clients about this. It's not something that was so difficult  
18 to accomplish. And I don't think that ABN can claim that it  
19 was a secret. I mean, I got that implication.

20           And, you know, to argue, just moving to Mr. Krakauer  
21 for a minute, that Dr. Bondi is somehow taking positions that  
22 he knows to be untrue, he's taking positions consistent with  
23 the requirements of a Civil Code provision. As to what  
24 evidence -- I mean, lawyers and clients -- well, lawyers, for  
25 their clients, make objections to evidence all the time as

1 not sufficient under one statutory provision, one evidentiary  
2 rule, or another. This happens to be a statutory provision.

3 And a lot was said about not -- Dr. Bondi admitting  
4 that a loan was made. Well, you know, a loan may have been  
5 made, but we're talking about in the largest fraud case,  
6 certainly in Europe, that I'm aware of, where the parties who  
7 are signatories to all of these have been implicated in the  
8 fraud, a situation where compliance may have to be more  
9 stringent. If you're the trustee in a case where parties are  
10 putting forth documentation on guaranties which, by the way,  
11 in some cases, were a couple of months prior to the collapse,  
12 you have to question them, particularly if you have a  
13 statutory basis to do so.

14 And by the way, with respect to guaranty claims, in  
15 a U.S. bankruptcy case, if there's a fraudulent transfer,  
16 avoidance of a guaranty is a fraudulent transfer, that whole  
17 claim is gone, so that does happen, and the New York Court of  
18 Appeals usury case that I mentioned, where the lender thought  
19 they were making a -- thought it was making a loan that was  
20 not usurious, but ended up, guess what, it was. They had no  
21 ability to collect that loan, because it didn't comply with  
22 New York law, a state law that governed compliance with the  
23 loan, or governed compliance and then recovery of the loan.

24 So this is not anything extraordinarily harsh,  
25 anything that we would say, "oh, my God" to. This is a

1 situation, a statutory matter under the Italian Civil Code,  
2 which has many analogs, many analogs under U.S. law,  
3 particularly state laws that affect property rights, that are  
4 respected when you try to assert a claim against a trustee in  
5 a U.S. bankruptcy case.

6 The -- excuse me, Your Honor. I don't think I have  
7 that much to add on the Cur trans -- the Cur Holdings  
8 transaction. I think that's been fully described in our  
9 brief. Bank of America prevailed with respect to the claim  
10 in that case, Parmalat Pacific. It took an appeal. Dr.  
11 Bondi joined in the appeal. Bank of America argued that Dr.  
12 Bondi -- that the Parmalat Pacific appeal was inappropriate.  
13 Italian court took that up and ruled against Dr. Bondi.

14 BankBoston has argued about the good faith of Dr.  
15 Bondi in asserting *data certa* because it claims its loans are  
16 -- that Dr. Bondi has admitted its loans, via the claw-back  
17 action, so those issues of what type of assertion is  
18 appropriate are being asserted in the Italian Court.

19 And, Your Honor, in litigation, at least as I've  
20 seen it in Bankruptcy Court and outside of Bankruptcy Court,  
21 you put forth whatever arguments you have, so long as they're  
22 not frivolous, so long as you don't state something that you  
23 don't believe to be true, but if you think you have a good  
24 argument under a statute, remember, we're talking about the  
25 date of the guaranty being proved to be a date certain, and



1 it has to be done in certain ways, so even if you admitted  
2 that the loan was made, that may not be applicable to the  
3 guaranty.

4 And as Your Honor pointed out, and as we would point  
5 out ourselves, that the Bankruptcy Court or the Parma Court  
6 does take note of matters that are before the courts, that  
7 could create judicial estoppel. And so, to argue that the  
8 Court or the process is unfair is refuted by the very  
9 evidence that we have in this record.

10 Now, I will tell you that in Treco, that if that  
11 were a situation where a secured creditor, a U.S. secured  
12 creditor had failed to perfect on collateral in the local  
13 jurisdiction, I don't think the Second Circuit would have  
14 ruled the same way. It had a valid, perfected, secured  
15 claim, and the priority scheme was upside down, putting  
16 administrative creditors ahead of the valid and perfected  
17 secured claim.

18 But if that creditor was trying to claim collateral  
19 in the Bahamas, I think it was the Bahamas, and they didn't  
20 perfect in accordance with the laws of the Bahamas, the  
21 Second Circuit wouldn't care. That would be too bad, because  
22 they didn't perfect their collateral interest. But that's  
23 not the Treco case. If that were the case, it would be more  
24 analogous and, you know, if the Second Circuit had thought  
25 something was wrong with that, that could be more analogous

1 to this, but it's not.

2           Your Honor, I would just point out that I think this  
3 was clear, but I want to make it extra clear, that Dr. Bondi  
4 is not in control of the Brazilian insolvency proceeding.  
5 That's a long story in and of itself, but how claims are  
6 admitted in Brazil is not something in Dr. Bondi's control.  
7 BankBoston, I'm not even sure, has claims against the  
8 Brazilian entity. We know they have claims against the  
9 Chilean and the African entities, but Dr. Bondi is not  
10 interfering with the pursuit of claims against those  
11 entities, and if there is recovery, there is and if there  
12 isn't, there's not.

13           In the same way that as with ABN AMRO, we had agreed  
14 very early in this proceeding that they could proceed to sue  
15 Wishaw, the Uruguayan entity, on their primary claim. I  
16 don't know how that turned out.

17           MR. COMET: And they got a judgment.

18           MS. GOLDSTEIN: They did get a judgment. But, Your  
19 Honor, those are things that Dr. Bondi is not involved in,  
20 and so, I just wanted to make sure that we do not mix up the  
21 loan and the Parmalat S.p.A. guaranties.

22           Your Honor, overall, just to conclude, I don't think  
23 that anything has been brought to this Court that would  
24 indicate that Section 304(c) standards have not been  
25 satisfied. There is nothing in the Italian bankruptcy scheme

1 that is repugnant to U.S. law, the *data certa* principle a  
2 non-bankruptcy, Civil Code provision, not that different in  
3 how it's applied to U.S. analogs of state law, and even  
4 though the statute doesn't even require that, I mean, I think  
5 that's something that we did address, and we feel is  
6 analogous.

7 And as for the conduct of Dr. Bondi complained of by  
8 Bank of America, we really could not follow, to be honest,  
9 any situation, or didn't hear any situation identified by Mr.  
10 Krakauer, that could rise to the level of sanctions. This is  
11 an advocate. They don't like his advocacy. I don't like the  
12 Bank of America advocacy, but I'm not complaining and saying  
13 that they're acting in bad faith.

14 Mr. Krakauer is an aggressive litigator. I  
15 understand that. We've been barraged with reams of  
16 unnecessary discovery. We've talked to you about it a number  
17 of times, but we didn't say he should be sanctioned. We  
18 didn't say it's bad faith. And Dr. Bondi is no different.

19 And for the PBGC, I guess we ought to wait to hear  
20 more from the PBGC, but I would say that this injunction does  
21 not bar any control group claim against Parmalat S.p.A.  
22 should one ever arise, but just like every other creditor, it  
23 would have to be asserted in the Italian proceeding.

24 THE COURT: Okay. Let me just hear from the lawyer  
25 for the PBGC.

1 MR. MURRELL: Thank you, Your Honor.

2 THE COURT: Sure.

3 MR. MURRELL: Vicente Murrell, again.

4 Your Honor, I have to apologize. I'm looking at  
5 this. I think I was looking at two separate versions of the  
6 order and, in fact, when I drafted -- when I drafted and when  
7 this was filed, it actually probably references different --  
8 probably different paragraphs, so my sincere apologies to  
9 Your Honor.

10 THE COURT: Well, they probably listened to your  
11 first objection, so ...

12 (Laughter.)

13 THE COURT: They probably amended it in light of  
14 your first objection, so I think your issues are covered,  
15 then?

16 MR. MURRELL: Well, Your Honor, I guess. The  
17 situation here, Your Honor, the way PBGC looks at it is that,  
18 see, there's two issues here. One is that what PBGC, I guess  
19 -- what we look upon as a release and what the debtor called  
20 -- you know, calls channeling, and I guess the other would  
21 be, you know, the possible -- the 306 language at the end of  
22 the order regarding the professionals.

23 Your Honor, although the debtor cleverly couches  
24 what they're asking the Court to do as channeling, they're  
25 somewhat extraordinary, Your Honor, from our -- you know,

1 from the standpoint we think of U.S. law, in that yes, we're  
2 a creditor, a potential creditor, Your Honor. We have, you  
3 know, potential -- we have contingent claims, but unlike all  
4 other creditors in this case, we're a government agency, Your  
5 Honor, and we're basically -- what the debtor is asking here  
6 in this -- you know, in this permanent injunction order, is  
7 for the Court -- the Court -- a federal court to tell a  
8 federal agency, you bring your claims that arise under U.S.  
9 law and your enforcement authority under U.S. law, and go to  
10 a foreign court and ask the foreign court to then, you know,  
11 to then adjudicate U.S. claims that arise under U.S. law and  
12 to enforce United States law. And to us, Your Honor, that  
13 seems, you know, somewhat a -- it seems somewhat  
14 extraordinary and it also seems to be vile -- you know, seems  
15 to go against established case law. Now, Your Honor --

16 THE COURT: What case law?

17 MR. MURRELL: Well, Your Honor, I apologize. This  
18 is not cited in the brief, but, you know, we think, Your  
19 Honor, in the Supreme Court, Your Honor, in U.S. v. Spelar,  
20 and I'll give you the cite, Your Honor, because again, I  
21 apologize, this has not been a front-burner case of mine, and  
22 that's not -- and that's my fault, Your Honor. That's not  
23 the agency. I take personal responsibility for that. 338  
24 U.S. 217, Page 221. The Supreme Court has said that absent  
25 legislation, you know, waiving, you know -- specifically

1 granting or waiving, you know, immunity, that U.S. law --  
2 that U.S. liabilities are not to be placed in the hands of,  
3 you know, the hands of some foreign -- some foreign entity,  
4 and that, Your Honor, is what is happening, you know. And  
5 essentially here -- that's what's happening here, Your Honor.  
6 And it's not somewhat -- it's not really just, you know, a  
7 hypothetical, when, you know, when we -- when I say this,  
8 Your Honor. Because, I mean, yeah, the claims are  
9 contingent.

10 But, Your Honor, if you play it out, Your Honor,  
11 what happens? Let's say a plan, one of the pension -- one of  
12 the six pension plans that were formerly in the old Parmalat  
13 control group --

14 THE COURT: No. I understand there's a possibility  
15 of asserting a claim eventually.

16 MR. MURRELL: Yes.

17 THE COURT: That's fine. But I still don't -- I've  
18 never seen a case that carved out governmental agencies from  
19 an injunction under 304.

20 MR. MURRELL: Your Honor, you know, maybe I -- you  
21 know -- maybe we didn't discover it in our research, but we  
22 don't see any -- we have not seen any cases where a federal  
23 agency has to go and say -- if the agency decides to debar  
24 someone, they can't do any additional federal work where they  
25 have to -- you know, where they have to go overseas and go

1 into a foreign court to get -- you know, in order to have  
2 that adjudicated. I mean, certainly there are a number of  
3 Internal Revenue cases, Your Honor, where the -- you know,  
4 the Service has tax liability -- or asserts tax liability  
5 against entities, and they don't go into foreign courts, Your  
6 Honor, to -- you know, to litigate, you know, U.S. tax  
7 liability that arises under United States law.

8 Similarly here, that's what would happen, Your  
9 Honor. If a plan -- one of the pension plan -- one of the  
10 six pension plans fifty million -- it was under funded by \$50  
11 million, and terminated tomorrow. Well, Your Honor, let's  
12 say we find out that something -- you know, some fiduciary  
13 breach has been committed by, you know, Parmalat Finanziaria  
14 or one of the entities being released -- being -- you know,  
15 that's being released or channeled, as the debtor would have  
16 it, channeled over to the Parma Court.

17 Well, Your Honor, what then would we have to do?  
18 Instead of normally coming into court where ERISA says we're  
19 supposed to, ERISA says that we've -- that PBGC is  
20 specifically -- Congress has said that we are to litigate and  
21 bring our cases in federal District Court.

22 What would happen then, under -- you know, under  
23 this scenario, Your Honor, is that we would then be forced to  
24 go to the Parma Court and then bring an action there under --  
25 you know, under ERISA, in an Italian Court, you know, to have

1 -- to -- you know, determine what our damages are and to  
2 potentially bring an action, say, to either, you know, debar  
3 someone, you know, get some extraordinary order against them  
4 to say -- or a prohibition against them or a cease and desist  
5 order against --

6 THE COURT: Well, wait, wait, wait. This is just to  
7 pursue claims, right? I mean, I --

8 MR. MURRELL: Well, Your Honor --

9 MS. GOLDSTEIN: Your Honor, this is just the  
10 possible monetary claim, and frankly, if there were never a  
11 bankruptcy of Parmalat S.p.A., and just a bankruptcy of  
12 Parmalat USA, the PBGC would probably have to go to Italy to  
13 get jurisdiction over the assertion of a claim against  
14 Parmalat S.p.A. This is not --

15 THE COURT: Also, Paragraph 9 of this order, if  
16 you're actually asserting police power, Paragraph 9 would let  
17 you come back to this Court and if you had some concern that  
18 the -- you were stayed, you could come back on that grounds.

19 MR. MURRELL: So far, monetary claims, Your Honor,  
20 and just to make a clarification, if Parmalat Finanziaria  
21 never went bankrupt, Your Honor, we still could pursue that  
22 here in the United States.

23 THE COURT: Not if they didn't do business here.  
24 You wouldn't be able to --

25 MS. GOLDSTEIN: No.



1 MR. MURRELL: Well, if they had assets here, Your  
2 Honor.

3 THE COURT: -- get jurisdiction over them.

4 MR. MURRELL: If they didn't have any presence here  
5 at all, we wouldn't be able to. If an entity has --

6 THE COURT: I mean, in a way, this gives you an  
7 advantage, because you can actually go into their case and  
8 actually collect something.

9 MR. MURRELL: Well, Your Honor, you know, we could  
10 have -- what Your Honor is saying -- that yeah, we could be  
11 channeled in over there, Your Honor, but if we had -- if, you  
12 know, Parmalat Finanziaria owns this piece of property here  
13 or has an account, and, you know, what this is ordered is  
14 saying that, well, PBGC, you can't touch that until -- you  
15 have to go to the Parma Court, as opposed to normally, we  
16 would be able to go into federal court, you know, get the  
17 plan terminated.

18 THE COURT: I think I've heard enough of this one.

19 MR. MURRELL: Okay. Thank you, Your Honor.

20 THE COURT: Just briefly.

21 MR. KRAKAUER: Very brief. I'll make it very brief.

22 I just wanted to point out one thing, just in  
23 response to what Ms. Goldstein said. She indicated that  
24 maybe there was some question on the guaranties, that there  
25 was, with respect to the loans. In the particular footnote

1 that they have to their brief, they quote out of their  
2 complaint, and their complaint specifically asserts that the  
3 Cur loan was guaranteed by Parmalat S.p.A. That's in their  
4 own pleading, own compliant.

5 And then, with regard to the other Bank of America  
6 loan, I'll just read you what another pleading before Judge  
7 Kaplan is. There's an answer where -- to our counterclaim.  
8 The counterclaim assertion is on July 5th, 1996, Bank of  
9 America NTSA entered into a note purchase agreement to lend  
10 \$75 million to Brazil with BAS, LLC acting as agent. The  
11 loan was guaranteed by Parmalat, S.p.A. Those are the  
12 allegations. And the response, the answer is, Dr. Bondi  
13 admits the allegations set forth in the first and second  
14 sentence. So these are not matters that there is any  
15 question about in the U.S. proceedings.

16 THE COURT: Well, but I guess -- okay. All right.

17 MR. KRAKAUER: I mean, they're their admissions on  
18 the record.

19 THE COURT: But this is -- I mean, given that  
20 earlier ruling that I quoted from, which relied on evidence  
21 scantier than that, don't you have a slam dunk in your  
22 litigation, if you ever -- I mean, come on. It's an  
23 admission.

24 MR. KRAKAUER: Your Honor, I -- all I could say, I'm  
25 not here testifying as an expert on Italian law. I wouldn't

1 do that to you or to myself. I just -- but what I am saying  
2 is you look -- you look at the fact that -- of what's going  
3 on over there, and if BankBoston was subject to litigation, I  
4 guarantee you'd have the exact same sort of admissions  
5 floating around because --

6 THE COURT: Well, was it apparently given to the  
7 Italian Court? Because the same judge would have ruled, I  
8 assume, the same way he ruled on Number 176, that Dr. Bondi  
9 be estopped because that's how he ruled on it --

10 MR. KRAKAUER: Your Honor.

11 THE COURT: But he didn't rule on that. He ruled on  
12 -- that there were just e-mails and letters submitted.

13 MS. GOLDSTEIN: Your Honor, just -- may I just  
14 clarify that the Cur loan was allowed.

15 THE COURT: No, I understand.

16 MS. GOLDSTEIN: Okay. And then we --

17 THE COURT: But all I'm saying is that it seems to  
18 me that if there's --

19 MS. GOLDSTEIN: But he's complaining about it as  
20 though it were disallowed --

21 THE COURT: No, I know.

22 MS. GOLDSTEIN: -- and the Bank of America  
23 Securities loan was disallowed, but on grounds of *data certa*.

24 MR. KRAKAUER: Your Honor, I'll just come back to my  
25 fundamental point. You have to measure not only what the

1 Court has done of what Mr. Bondi -- how Mr. Bondi is handling  
2 the proceeding, and look and see whether 304(c) really means  
3 what it says in terms of just treatment. And I just submit  
4 that what he's doing is just inconsistent with what he knows  
5 the facts to be and as I've just read to you what he's  
6 admitted the facts to be here in the United States.

7 THE COURT: Okay.

8 MR. KRAKAUER: That's my point.

9 THE COURT: All right.

10 MR. GINSBURG: Your Honor, may I be even briefer?

11 THE COURT: All right.

12 MR. GINSBURG: Just responding to one thing that Ms.  
13 Goldstein says, trying to draw the distinction between the  
14 guaranty and the note. I believe, in our case, and I believe  
15 proof has been submitted to Parmalat's representatives, the  
16 \$10 million advanced by ABN went to Wishaw Trading, which was  
17 a subsidiary of -- not wholly owned, but an affiliate,  
18 certainly, of Parmalat, and was upstreamed to Parmalat.

19 So in this case, at least, there was no distinction,  
20 in effect, between -- that Wishaw was used as a device to  
21 upstream money to Italy. I believe that --

22 THE COURT: I'm not sure that's the best thing for  
23 your client, at least based on what I've read --

24 MR. GINSBURG: Okay.

25 THE COURT: -- about Wishaw's role in all of this.

1 MR. GINSBURG: It's what I believe the facts to be.

2 THE COURT: Okay. I mean, not for your client on  
3 this particular point, but on the general point, which may  
4 suggest why Dr. Bondi is pushing this one. I refer to the  
5 fact that at least it's alleged by Dr. Bondi that Wishaw a  
6 black box, and sort of at the heart of one of the frauds.

7 Okay. I have before me the motion by the Parmalat  
8 Finanziaria S.p.A., et al, foreign debtors, all of which are  
9 debtors in proceedings for extraordinary administration, that  
10 have been pending in the Civil and Criminal Court of Parma,  
11 Italy since, at least in the case of S.p.A., December 24,  
12 2003, through the extraordinary commissioner appointed for  
13 those debtors, Dr. Enrico Bondi, for the entry by this Court  
14 of a permanent injunction under Section 304(b)(1) of the  
15 Bankruptcy Code as, in effect, when the foreign debtors file  
16 their ancillary proceedings here on June 22, 2004.

17 The record of these cases is one, generally, of a  
18 fairly brief hearing, pursuant to which I entered a  
19 preliminary injunction under Section 304(b)(1), and frequent  
20 extensions of that injunction, some of which were contested,  
21 in part, but generally, which was not contested. During that  
22 time, or during much of that time, Dr. Bondi pursued the  
23 formulation and approval of a composition with the foreign  
24 debtors' creditors. That composition was approved by the  
25 Parma Court on October 1st, 2005. It's essentially

1 equivalent of a plan of reorganization for most of the  
2 foreign debtors, although a few are being liquidated  
3 separately.

4           One significant element of the composition is the  
5 continued pursuit of substantial litigation by the  
6 reorganized debtors and Dr. Bondi, both in Italy and here, in  
7 the multi-district litigation, before District Judge Kaplan,  
8 as well as in New Jersey on various matters, related to  
9 Parmalat's demise and the alleged frauds involved in its  
10 financial transactions, as well as in Italy, more traditional  
11 avoidance or recovery litigation under Italian insolvency  
12 law.

13           As discussed by Ms. Goldstein, there's been quite  
14 extensive notice of the foreign debtors' request for a  
15 permanent injunction and the record, in connection with any  
16 objection that parties wanted to make to that request, has  
17 had ample time to be developed. It turns out that, at this  
18 point, there are three remaining objections to the issuance  
19 of the permanent injunction and, in fact, two of those  
20 objections are limited. In essence, Bank of America, Bank of  
21 America Securities and BankBoston, as well as ABN AMRO, seek  
22 to condition the Court's issuance of a permanent injunction  
23 on the restriction of Dr. Bondi to pursue a certain type of  
24 claim objection under Italian law. Additionally, the Pension  
25 Benefit Guaranty Corporation seeks to be relieved of the

1 injunction entirely.

2           Initially, Bank of America/BankBoston had other  
3 objections to the proposed permanent injunction. Going to  
4 the extent of that injunction, i.e., A, whether it would be  
5 applied outside of the United States; B, whether it would  
6 exceed the reorganized debtors' rights under their  
7 composition or under applicable Italian law, including in  
8 respect to the liquidating debtors and; C, whether and to  
9 what extent it would restrict their rights, if any, against  
10 non-foreign debtor subsidiaries and affiliates, and finally;  
11 D, and this would go just for BankBoston -- I'm sorry, this  
12 would go just for Bank of America and B of A Securities, how  
13 the proposed injunction would relate to or intersect with  
14 District Judge Kaplan's order withdrawing the reference,  
15 partially in connection with the multi-district litigation.

16           I believe all of those issues, though, A through D,  
17 as I've listed them, have been resolved on the record of the  
18 hearing, based on the back and forth with counsel for the  
19 foreign debtors and changes to the language of the order or  
20 clarifications of the order. And my ruling assumes that  
21 those clarifications will be made. I don't believe I need to  
22 go over them again. I think the order -- I'm sorry. I think  
23 the record reflects them. I also think the parties  
24 understand the changes to be made. In any event, I will give  
25 them my notes, so they can compare those to their own notes

1 and ultimately, I'll go over the order that's to be  
2 submitted, to assure myself that it conforms with what was  
3 set forth on the record.

4           So that leaves, therefore, the three objections.  
5 Really, two are on the same grounds, and then the third by  
6 the PBGC. Before turning to those objections, however, let  
7 me address first the foreign debtors' objection to Bank of  
8 America's and Bank of America Securities' standing to object  
9 to the permanent injunction.

10           As clarified on the record, it appears to me, as a  
11 practical matter, that B of A and BASL have little or nothing  
12 at stake in this hearing because of the clarifications on the  
13 record as to the limited extent of the injunction as it  
14 pertains to them. However, going into the hearing, it wasn't  
15 clear to me, and I believe it wasn't clear to them, that that  
16 was the case, based on a fair reading, at least, of the  
17 proposed order. So I conclude that they did have standing to  
18 address the Court on their issues, including Issues A through  
19 D that I described.

20           I have less of a sense that they have standing on  
21 the *data certa* point, given the clarification of those  
22 issues, but as a practical matter, they're represented by the  
23 same counsel as BankBoston, which does clearly have standing  
24 going forward.

25           In any event, I have treated, for purposes of this



1 hearing, Bank of America and Bank of America Securities as  
2 creditors that have standing to be heard, given their  
3 economic stake in -- at a minimum, clarifying the terms of  
4 the proposed order.

5 Section 304 of the Bankruptcy Code, which has  
6 subsequently been repealed, but is still in effect for this  
7 case, allows a Bankruptcy Court to enjoin any proceeding or  
8 action against a foreign debtor with respect to the debtor  
9 itself and property, quote, "involved in such foreign  
10 proceeding," as well as other appropriate relief under  
11 Section 304(b).

12 In determining whether to grant such relief, the  
13 Court, quote:

14 "Shall be guided by what will best assure an  
15 economical and expeditious administration of the  
16 foreign debtors' estate, consistent with five  
17 factors which are relevant here: Just treatment of  
18 all holders of claims against or interest in such  
19 estate; protection of claimholders in the United  
20 States against prejudice and inconvenience, and the  
21 processing of claims in such foreign proceeding;  
22 prevention of preferential or fraudulent  
23 dispositions of property of the estate; distribution  
24 of proceeds if such estate substantially, in  
25 accordance with the orders prescribed by this title,

1           that is Title 11 of the Bankruptcy Code; and  
2           comity."

3           The factors that I quoted are designed to give the  
4 Court maximum flexibility and to permit the Court to make the  
5 appropriate orders under all of the circumstances of each  
6 case, rather than being provided with inflexible rules. See  
7 H.R. Rep. No. 95-595 at 324, 325 (1977), as well as In Re  
8 Treco, 240 F.3d 148, 156 (2d Cir. 2001), which discusses the  
9 general inquiry to be made by the Court, stating first that  
10 comity is the ultimate consideration, although also noting,  
11 again, that the Court should make a case-by-case  
12 determination that comity itself does not require blind  
13 deference to a foreign proceeding and that generally, comity  
14 takes into account the other four factors; that is, although  
15 one factor, even the general principle of comity may support  
16 granting a permanent injunction, another may compel the  
17 opposite conclusion in the appropriate circumstance in the  
18 Court's weighing of all the factors in light of the  
19 particular case.

20           Let me note further that generally, in keeping with  
21 the overall policy described in the case law, as well as by  
22 Congress and the legislative history, Section 304 is  
23 consistent with the general policy of U.S. law to recognize  
24 the importance of centralizing the administration of  
25 bankruptcy cases and estates in the home jurisdiction, and

1 assisting, consistent with protecting appropriately the  
2 rights of U.S. creditors against unfair treatment or unfair  
3 discrimination, the home Court to conduct the reorganization,  
4 and also assisting it, as is requested here, to implement the  
5 reorganization.

6           Generally speaking, as I said, there is no overall  
7 objection to the issuance of a permanent injunction to  
8 implement the foreign debtors' composition and the  
9 liquidation of the liquidating debtors, except as far as the  
10 PBGC is concerned, and I will address the PBGC's objection at  
11 the end of my ruling. This is consistent, generally, with  
12 how the courts have treated Italian compositions. They have  
13 uniformly recognized that compositions under Italian law and  
14 the Italian Courts administering such compositions and  
15 bankruptcy cases, are entitled to be accorded comity, and  
16 that generally speaking, Italian bankruptcy law is fair on  
17 its face, as well as as applied. See, for example, In Re  
18 Rosacometta, S.r.l., 336 B.R. 557 (Bankr. S.D. Fla.) and In  
19 Re Artimm, S.r.l., 278 B.R. 832, (Bankr. C.D. Cal. 2002), as  
20 well as In Re InterCONS Virginia, Inc., 812 F.2d 1469 (4th  
21 Cir. 1987), which although not a 304 case, recognized the  
22 fundamental fairness of the Italian bankruptcy law and  
23 process, both as drafted and as applied.

24           I, too, find that on a general basis, the foreign  
25 proceedings in Parma provide for a comprehensive procedure

1 for the orderly and equitable distribution of the foreign  
2 debtors' assets, and the just treatment of creditors  
3 generally. I find that generally, U.S. claimholders are not  
4 discriminated against or unduly prejudiced or inconvenienced  
5 in the proceeding, that analogous to U.S. law, the Italian  
6 law provides for the prevention of preferential or fraudulent  
7 dispositions. Indeed, that is a primary purpose of the  
8 composition, and generally, that the distribution of proceeds  
9 of the foreign debtors' estate is substantially in accordance  
10 with the order prescribed by Title 11.

11 Of course, as the Courts have ruled, the last  
12 provision quoted requires substantial compliance, as opposed  
13 to complete compliance, and generally speaking, that  
14 requirement means that the difference in the law, as far as  
15 the distribution of proceeds, must be such that we would find  
16 it to be repugnant to U.S. notions of either substantive or  
17 procedural law and justice. See, generally In Re Ephedra  
18 Products Liability Litigation, 349 B.R. 333, (S.D.N.Y. 2006)  
19 and In Re Board of Directors of Telecom Argentina, S.A., 2006  
20 Westlaw 686-867 at 23 (Bankr. S.D.N.Y. 2006), as well as the  
21 general discussion in JP Morgan Chase Bank v. Altos Hornos De  
22 Mexico, S.A., 412 F.3d 418 (2d Cir. 2005).

23 As I noted, the B of A/BankBoston objection, as well  
24 as the ABN AMRO objection focuses not on how the Italian law  
25 is drafted generally, or the way that the Italian Court has

1 applied it, but rather to a particular provision of Italian  
2 law. The so-called "*data certa*," c-e-r-t-a, provision of  
3 Italian law, which is found at Section 2704 of the Civil Law,  
4 again, not the Bankruptcy Code or the Italian equivalent,  
5 that provision states:

6 "Date of private writing as to third persons. The  
7 date of a private writing in which the signature has  
8 not been authenticated is not certain and cannot be  
9 asserted against third persons, except from the day  
10 on which the writing was registered, or from the  
11 date of death or supervening physical incapacity,  
12 the sign of the person or persons who signed it, or  
13 from the date on which the contents of such writing  
14 are reproduced in public acts, or from the date on  
15 which other circumstances occur, which establish  
16 with equal certainty that the writing was drawn up  
17 previously."

18 As applied or as sought be applied by Dr. Bondi in  
19 the foreign debtors' cases before the Parma Court, this  
20 provision of the Italian Civil Code would invalidate  
21 guaranties obtained by B of A, BankBoston and BASL from one  
22 of the Italian debtors. Because it is asserted by Dr. Bondi,  
23 the date of that guaranty cannot be established for purposes  
24 of the *data certa* provision, as having occurred before the  
25 insolvency proceedings commenced. He contends that third

1 parties are implicated by the assertion of the guaranty,  
2 since the assertion of the guaranty and the successful  
3 assertion of it would dilute those parties' recovery and,  
4 therefore, he has put those creditors, as well as many  
5 others, to the test of proving, for purposes of that statute,  
6 the date of the guaranty.

7 BankBoston, Bank of America and BASL and ABN AMRO  
8 raise a number of objections to the issuance of the  
9 injunction, without some carve-out to preclude Dr. Bondi from  
10 pursuing this litigation further. The first point they make  
11 is that the law itself is repugnant to fundamental notions of  
12 United States law. I'll note that because it is a provision  
13 extraneous to the bankruptcy law, and more akin to a U.S.  
14 domestic law requirement for authenticating a mortgage or the  
15 like, that I have some real question as to whether Section  
16 304(c)(4) is directed to this objection at all, but I  
17 believe, given the catch-all provision, that I should  
18 consider general principles of comity. I don't think that B  
19 of A, BankBoston, BASL and ABN AMRO are precluded from making  
20 the argument.

21 However, the statute, on its face, to me, does not  
22 appear to be so foreign to basic concepts of U.S. law that it  
23 would be denied out-of-the-box comity. I say that for a  
24 number of reasons. The first is the very wording of the  
25 statute. It does permit, as I quoted it in the catch-all

1 provision, other ways to establish, with equal certainty,  
2 that the writing was drawn up before the date of insolvency.

3           It also is analogous, in my mind, to other  
4 relatively rigid requirements of U.S. law, both U.S. non-  
5 bankruptcy law and bankruptcy law. We spent quite a bit of  
6 time talking about that at oral argument, but it appears to  
7 me that U.S. bankruptcy law, in quite rigidly permitting, for  
8 the benefit of the entire estate, the avoidance of a lien or  
9 mortgage that has not been perfected pursuant to the  
10 applicable requirements of non-bankruptcy law, either under  
11 the UCC applicable mortgage recordation statutes, applicable  
12 automobile title statutes, the Ship Mortgage Act or Louisiana  
13 Oil and Gas Law, can have quite a rigid and equally  
14 confiscatory effect, which would not apply, as I don't  
15 believe this law would apply if it were just a case of a  
16 dispute between the issuer of the guaranty or the issuer of  
17 the mortgage, but would apply when third parties are  
18 involved, such as creditors in a bankruptcy case.

19           There's, in a civil context, in my experience, fewer  
20 chilling statements than Justice Holmes' statements in Moore  
21 v. Bay about the consequences of not complying with the  
22 requirements of perfection, and the consequences of that.

23           It also appears to me that this law has been applied  
24 in a way that is consistent with U.S. notions of due process  
25 and fundamental fairness by the Italian Courts. Indeed, in

1 certain circumstances, the Italian Courts have ruled in favor  
2 of the objectors, and not just because they believed that the  
3 objectors did, in fact, have their documents notarized, but  
4 at least in one instance, which I've quoted during oral  
5 argument, because Dr. Bondi took a contrary position as to  
6 the existence of the guaranty in other litigation. In all  
7 instances where the objectors lost in the Italian Court, the  
8 matter is on appeal.

9           It is argued by the objectors that the Italian Court  
10 improperly excluded certain types of evidence in connection  
11 with its determination on the merits, but I have two things  
12 to say in response to that argument. The first is that I do  
13 not believe that the requirement of fundamental fairness and  
14 due process requires the admission of all requested evidence,  
15 particularly where such evidence would be irrelevant to the  
16 statute. Secondly, based on the record, in particular the  
17 translated rulings by the Parma Court, it appears to me that  
18 the evidence that was offered or that the Parma Court  
19 considered was oral evidence, e-mails and the debtors, that  
20 is the pre-insolvency debtors' documents, all of which a  
21 Court reasonably could consider excluding, particularly in a  
22 case where consideration of an underlying fraud by the same  
23 pre-insolvency debtors or pre-insolvency proceeding debtors  
24 was so significant.

25           More troubling is the suggestion that



1 notwithstanding the one ruling that I quoted, where the Parma  
2 Court denied Dr. Bondi's objection on what appears to me to  
3 be an estopped principle, is the suggestion that the Parma  
4 Court is letting Dr. Bondi run roughshod over it and the  
5 claimants by taking a position that he knows is untrue, as a  
6 matter of fact. It does not appear to me, however, from the  
7 Parma Court's rulings, or their submissions, the affidavit  
8 submissions, that that is, in fact, the case. There is no  
9 discussion by the Parma Court in any of the rulings that I've  
10 been shown in which it appears that such an argument has been  
11 made to the Parma Court, i.e. that Dr. Bondi has admitted  
12 elsewhere that the relevant guaranty was entered into before  
13 the insolvency proceeding began and denied by the Parma  
14 Court. Indeed, just the opposite appears to be the case.  
15 The only time I've seen an instance where that argument was  
16 made, the Parma Court accepted it.

17           Finally, it is argued that Dr. Bondi's own use of  
18 the statute, not the Parma Court's use of it and not the  
19 statute itself, but his own use of it is in bad faith or  
20 repugnant to basic notions of fairness and due process. It  
21 has not been argued, but I think it could be argued, in the  
22 proper circumstance, also, that if a foreign representative  
23 or a foreign debtor has unclean hands, it should not be able  
24 to seek injunctive relief, which, of course, in an equitable  
25 remedy, ultimately.

1           Having said that, let me note that there is very  
2 scarce law suggesting a broad right of a U.S. Court under 304  
3 to limit the reach of a requested injunction because of a  
4 litigation strategy chosen by a foreign liquidator or  
5 administrator or commissioner, and with good reason. Thus,  
6 while there are general statements in the cases that the  
7 Court must consider, whether the foreign proceeding is being  
8 conducted in good faith, the primary focus of the Court's  
9 inquiry, I believe, should be on the Court's conduct of that  
10 proceeding and the underlying law of that proceeding. See  
11 Ecoban Finance Limited v. Grupo Acerero Del Norte, S.A., 108  
12 F.Supp. 2d 349 (S.D.N.Y. 2000), aff'd 242 F.3d 364 (2d Cir.  
13 2001). Indeed, the only instance I've found where the Court  
14 had arguably a consideration of the conduct of the foreign  
15 administrator or liquidator or commissioner, as a material  
16 element of denying injunctive relief was the Treco case that  
17 I cited earlier. However, in that case, as described or  
18 commented on by Judge Lifland in In Re Board of Directors of  
19 Compania General de Combustibles, S.A., 269 B.R. 104 (Bankr.  
20 S.D.N.Y 2001), it is important to note at the outset that the  
21 Treco decision was based on an egregious set of facts  
22 involving what could be characterized as substantial  
23 maladministration by foreign liquidators of a foreign  
24 proceeding. And as one could take away from the Second  
25 Circuit's opinion in Treco, what Judge Lifland was referring

1 to was essentially a situation where it seemed quite clear  
2 that the foreign liquidators, knowing that their claims came  
3 ahead of the secured claim of the creditors -- of the  
4 complaining creditor, were incurring enormous costs and fees  
5 that were essentially going to eat up the estate, without any  
6 recovery by any other creditors, including the secured  
7 creditor.

8 I simply did not see an analogous situation here.  
9 The statute says what it says, that is the *data certa*  
10 statute, and it is, I believe, within Dr. Bondi's discretion  
11 to pursue the debtors' rights under it. It is also within  
12 his discretion to pursue the debtors' rights under it  
13 differently against certainly entities who are in other  
14 litigation with the foreign debtors, such as Bank of America  
15 and BASL, as well as potential litigation targets,  
16 BankBoston.

17 But even if that were not the case, and I do not  
18 believe it's the case, at least it's not aggressively  
19 asserted by Dr. Bondi here that ABN AMRO is a potential  
20 target, it's also within a trustee's discretion generally to  
21 decide when and with whom he or she wants to settle.  
22 Therefore, the fact that Dr. Bondi has settled with other  
23 claimants whose guaranty claims he's also objected to on *data*  
24 *certa* grounds, should not tie his hands in exercising his  
25 discretion with regard to every creditor.

1           This is not, therefore, I believe, a situation like  
2 Treco. I also believe it's not a situation like In Re  
3 Papeleras Reunidas, S.A., 92 B.R. 584 (Bankr. E.D.N.Y. 1988),  
4 relied on heavily by B of A and ABN AMRO, where, in addition  
5 to the distinction between Spanish insolvency law and U.S.  
6 law, and again, I point out that the complaint about law here  
7 is not an insolvency law provision, but a general civil law  
8 provision governing the validity of guaranties, there were  
9 numerous other factors present that led Judge Duberstein to  
10 deny injunctive relief, including a lack of notice generally,  
11 as well as a lack of notice with regard to sale of collateral  
12 and destruction of liens.

13           Finally, on this point, I note that, as I said  
14 before, litigation is continuing in the Italian Courts on all  
15 of the *data certa* objections. I believe it would be  
16 inappropriate for me to step in, given that that litigation  
17 is ongoing, either to predict how the Italian Courts would  
18 conclude that litigation in the first place, or even worse,  
19 predict whether they would conclude it contrary to everything  
20 they generally seem to have done, in a way that's  
21 fundamentally unfair and contrary to U.S. notions of due  
22 process and fairness, or to step in and regulate the  
23 commissioner, who is in front of them, with regard to any  
24 sorts of assertions as to sharp practice or estoppel.

25           There's been no showing to me that the Italian

1 Courts lack such an ability, and I am fairly confident that  
2 they do have the ability to control the lawyers who are  
3 appearing before them from asserting frivolous or unfounded  
4 positions, or that they lack the ability to ultimately  
5 control Dr. Bondi, if that is indeed what he is doing. I  
6 also note that as far as B of A and BASL are concerned, they  
7 also have some ability to make that argument, at least as far  
8 as judicial estoppel is concerned, if it's not made and  
9 determined by the Italian Courts in front of Judge Kaplan.

10 But ultimately, it seems to me that this is a  
11 requirement of having a valid guaranty under Italian law. A  
12 guaranty isn't a lien, but its value may be greater or less  
13 than a lien. They're both essentially credit supports, and  
14 it seems to me that Dr. Bondi cannot be faulted for pursuing  
15 a technical objection to a guaranty when he would not be  
16 faulted for pursuing a technical objection to a lien under,  
17 in each case, applicable non-bankruptcy law.

18 And perhaps that should lead into the last point on  
19 the *data certa* issue, which is a point raised by ABN AMRO,  
20 which notes that its documents have U.S. choice of law and  
21 forum selection provisions. As repeatedly noted by the  
22 Second Circuit, however, in a foreign bankruptcy case or  
23 where there is a foreign bankruptcy case, such provisions do  
24 not override the general notions of comity. As stated by the  
25 Second Circuit in Altos Hornos, quote:

1 "In other words, regardless of the parties' pre-  
2 litigation agreement, once a party declares  
3 bankruptcy in a foreign state and a foreign court  
4 asserts jurisdiction over the distribution of  
5 assets, U.S. Courts may defer to the foreign  
6 bankruptcy proceeding on international comity  
7 grounds. Consequently, JP Morgan's reliance on the  
8 loan agreements, forum selection and choice of law  
9 clauses is unavailing."

10 A similar analysis would apply here.

11 Finally, let me say that the proposed injunction,  
12 Paragraph 9, does permit all of the creditors affected by the  
13 injunction to return to this Court, in appropriate  
14 circumstances, for relief from the injunction. So that  
15 although I am prepared -- fully prepared to defer to the  
16 Italian Court's determination of the *data certa* issue, if, in  
17 fact, something occurs which would merit relief from the  
18 injunction, the creditors have the right to come back here to  
19 the extent that I have the reference.

20 Let me turn, then, to the PBGC's objection.  
21 Frankly, this was an objection that was made at the hearing.  
22 The debtors had no chance to prepare to deal with it. The  
23 original objection by the PBGC was based on language in the  
24 first form of proposed order, which was subsequently revised  
25 by the debtors, so that the current form of order does not

1 provide the type of protection to non-foreign-debtor third  
2 parties that the PBGC was concerned about in its objection.

3           Instead, the PBGC, at the hearing, stated that there  
4 should be a general carve out from a 304(b) injunction, to  
5 permit U.S. governmental agencies to pursue monetary claims  
6 against the foreign debtors in the United States. I know of  
7 no authority that would provide that such a carve out be  
8 required. Certainly 304 doesn't speak of it, and the  
9 legislative history doesn't speak of it.

10           The strong policy behind Section 304, as noted by  
11 numerous courts, again, is to focus the asset realization and  
12 claim liquidation process in the foreign court, subject to  
13 well-recognized exceptions for judicial convenience and  
14 economy and fundamental fairness, and consequently, I believe  
15 that such a carve out would contravene the underlying policy  
16 of the statute.

17           So, therefore, again, subject to Paragraph 9 of the  
18 order, which I think would be particularly applicable if a  
19 governmental agency were looking to, rather than collect on a  
20 monetary claim, assert some form of police or regulatory  
21 power, it seems perfectly appropriate to channel true claims,  
22 monetary claims, along with all other monetary creditors, to  
23 the -- or through the composition and to the Italian Courts.  
24 So I will deny the PBGC's objection.

25           So, as I said, I am prepared to enter the permanent

1 injunction with the modifications that I laid out on the  
2 record, and that were discussed on the record. Again, I'm  
3 happy to give you my mark-up of that, although it's not in  
4 lawyerese, it's in shorthand, and given that we have so few  
5 objectors, it seems to me that you should just circulate the  
6 revision to them, although you're free to circulate it to  
7 others, too, if they've had that type of role in the case,  
8 and that you don't have to settle the order, but that you  
9 should give parties sufficient time to look at your changes  
10 before you submit it.

11 As I remember, the preliminary injunction stays in  
12 effect until an order is entered one way or the other on the  
13 motion for permanent injunction, or is there a date at the  
14 end?

15 MS. GOLDSTEIN: I think we may have a date, and I  
16 would --

17 THE COURT: Well, if that's the case, I certainly am  
18 prepared to extend the preliminary injunction. There's no  
19 reason one wouldn't do so, given the fact that I've approved  
20 a permanent injunction.

21 MS. GOLDSTEIN: Well, Your Honor, we certainly would  
22 request that. We would appreciate your mark-up, as well. We  
23 would hope to be able to get an expedited transcript, so that  
24 when we modify the order, we will be able to take, you know,  
25 very specifically into account all of the discussion on the



1 record.

2 THE COURT: Okay. That's fine. Before you finish,  
3 though, or we finish, I want to go over with you two other  
4 comments I had on the order that may be somewhat substantive,  
5 and see if you have any problem with them.

6 The first one is Paragraph 10, which is the general  
7 306 language, and I had two comments on it. I had no comment  
8 on the first part of it, but if you go down about halfway  
9 through it, in addition to saying that nothing that you all  
10 have done, to the extent provided in 306, is a waiver, you  
11 also say such further orders or taking any actions would be a  
12 waiver, and not knowing what those things are, I don't see  
13 how I can grant that type of relief. You see the language  
14 I'm talking about?

15 MS. GOLDSTEIN: It's in the -- I'm just trying to --

16 THE COURT: That not only what you've done already,  
17 but also what you would do in the future would not constitute  
18 a waiver, and I can't predict the future. I don't know what  
19 you would do.

20 MS. GOLDSTEIN: Your Honor, we understand the  
21 comment.

22 THE COURT: Okay.

23 MS. GOLDSTEIN: I think we just need, probably, time  
24 to go through the language.

25 THE COURT: Okay. And then, on that same paragraph,

1 I would add a proviso, which is, provided that the  
2 effectiveness of this order is conditioned upon such parties'  
3 good-faith compliance with the orders of this Court, and to  
4 the extent of any withdrawal of the reference of the Section  
5 304 cases by the District Court -- the District Court.

6 MS. GOLDSTEIN: I apologize, Your Honor. Where --  
7 this is additional language?

8 THE COURT: That's at the end of Paragraph 10, and  
9 it's just consistent with 306 --

10 MS. GOLDSTEIN: Okay.

11 THE COURT: -- which says that you could condition,  
12 under 306, that type of relief on compliance with the Court's  
13 orders, and so I would, again, say, "provided that the  
14 effectiveness of this order is conditioned upon such parties'  
15 good-faith compliance with the orders of this Court and, to  
16 the extent of any withdrawal of the reference of the Section  
17 304 cases by the District Court, the District Court."

18 MS. GOLDSTEIN: Okay. Yes, Your Honor.

19 THE COURT: And then the last thing, which seemed  
20 like a no-brainer to me, but maybe there's a reason why it  
21 wasn't here, I added a paragraph. Maybe it was because it  
22 would be Paragraph 13 and people don't like thirteen. "This  
23 Court retains jurisdiction over disputes over the  
24 interpretation and enforcement of this order." It wouldn't  
25 be exclusive jurisdiction, but it would be clear that I would

1 have jurisdiction.

2 MS. GOLDSTEIN: We thought, Your Honor -- we have no  
3 problem with the concept. We thought that that was embedded  
4 in Paragraph 9, which says the Court shall retain  
5 jurisdiction with respect to the enforcement amendment or  
6 modification.

7 THE COURT: You're right.

8 MS. GOLDSTEIN: But we could add interpretation.

9 THE COURT: That's fine. That's fine. Okay. All  
10 right. Is there anything else?

11 MS. GOLDSTEIN: No, Your Honor. I think we will  
12 just submit an extended preliminary injunction order until we  
13 have the opportunity to refine the permanent injunction.

14 THE COURT: Okay. Very well. And my clerk will  
15 give you this to Xerox. You can give it to Mr. Krakauer,  
16 too.

17 MS. GOLDSTEIN: Okay. Thank you very much, Your  
18 Honor.

19 THE COURT: Thank you.

20 (Proceedings concluded at 6:07 p.m.)

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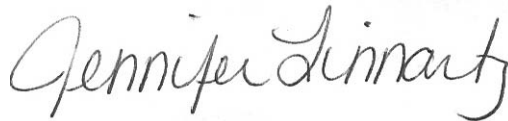
CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability, except where, as indicated, the Court has modified its bench ruling.



July 2, 2007

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Certified Court Transcriptionist  
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July 2, 2007

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